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Supreme Court, U.S.
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In the

Supreme Court of the United States

S. James Brown, Joint Tenant Trustee,

Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether every § 1983 plaintiff must exhaust state administrative remedies before commencing a civil rights action under 42 U.S.C. § 1983 in state court?

2. Whether Pennsylvania's General County Assessment Law, codified at 72 P.S. § 5020-101 *et. seq. as amended*, impairs the obligation of contract embodied in a trust deed to which Petitioner Brown is a real party in interest in violation of the Contract Clause of Article I, § 10, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 2004

S. James Brown, Joint Tenant Trustee,

Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

S. James Brown, Petitioner herein, respectfully petitions for a writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania. The Supreme Court of Pennsylvania did not choose this case for Allowance of Appeal.

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania is unreported. The judgment of the Commonwealth Court of Pennsylvania was subject under state law to discretionary review by the Pennsylvania's Supreme Court.

JURISDICTION

The jurisdictional statute governing this Honorable Court's review of state court judgments and decrees by certiorari with respect to questions arising under the Constitution and laws of the United States is codified at 28 U.S.C. § 1257. The Commonwealth Court of Pennsylvania's judgment is the highest court in which a decision could be had within the meaning of 28 U.S.C. § 1257.[1] Petitioner Brown respectfully suggests that a substantial federal question was properly raised at the outset in the state court proceedings below and that an adequate remedy under Pennsylvania law does not exist. (See Petitioner's § 1983 Complaint, 23a-40a.) (*See also*, 31a, par. 20 with respect to the allegation of an inadequate State remedy.)

STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America, Article I, § 10, cl.1 provides in part, that "No State shall... pass any Law impairing the Obligation of Contracts..."

The Fifth Amendment provides in part, that "No person shall be...deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in Section 1, that, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make

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[1] *Minneapolis, St. P. & S.S.M. Ry. Co. v. Rock*, 279 U.S. 410 (1929); *Virginia R. Co. v. Mullens*, 271 U.S. 220 (1926).

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section 5, provides that, "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."
Section 1983 of Title 42 of the United States Code states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Pennsylvania's General County Assessment Law, Act of May 22, 1933, P.L., 853, as amended, 72 P.S. § 5020-101 *et. seq.* states, in relevant part, at § 5020-201: entitled "Subjects of taxation enumerated" that: "The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate: (a) all real estate to wit: Houses, house trailers, and mobilehomes buildings permanently attached to land...and all other real estate not exempt by law from taxation."

Title 72 § 5341.14 entitled "Appeal to board; time for appeals" states in relevant part: (a) Any person aggrieved by any assessment...may file an appeal therefrom with the board. (b)

In any appeal of an assessment the board shall make the following determinations: (1) The current market value for the tax year in question. (2) The common level ratio. (c) The board, after determining the current market value of the property for the tax year in question, shall then apply the established predetermined ratio to such value unless the common level ratio varies by more than fifteen percent from the established predetermined ratio in which case the board shall apply the common level ratio to the current market value of the property for the tax year in question. (d) Nothing herein shall prevent any appellant from appealing any base year valuation without reference to ratio.

STATEMENT

Petitioner Brown, a real party in interest and Joint Tenant Trustee under a two-part declaration of trust embodied in a trust deed, brought a suit in March 2003 under 42 U.S.C. § 1983 (hereinafter "§ 1983" or "section 1983") in the Court of Common Pleas of Montgomery County, Pennsylvania (hereinafter "trial court"). The complaint set forth independent federal claims alleging that unconstitutional actions taken under Pennsylvania's General County Assessment Law (hereinafter "GCAL") are repugnant to rights protected by Article I, § 10, cl. 1, Amends. 5, 14 and that an adequate remedy did not exist under Pennsylvania law. The Common Pleas Court *sue sponte* dismissed Petitioner Brown's § 1983 complaint and his application for injunctive relief for "lack of subject matter jurisdiction". (15a). An appeal was taken to the Commonwealth Court of Pennsylvania (hereinafter "Commonwealth Court") which affirmed the trial court's decree. (2a). A Petition for Allowance of Appeal and Application for an Injunction was filed with the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied the allowance of appeal and injunctive relief. (1a).

A. Petitioner Brown, A Joint Tenant Trustee, Was Precluded From Bringing A § 1983 Suit In State Court.

This case involves the application and construction of federal constitutional provisions and 42 U.S.C. § 1983 with respect to Pennsylvania's General County Assessment Law, the Act of May 22, 1933, P.L., 853, *as amended*, 72 P.S. §§ 5020-101 *et. seq.* in light of the individual's natural liberty to dispose of property under terms of executory trust agreements to convey.[2] The individual's liberty to contract is antecedent to the creation of the state. Governments were instituted among the people to secure certain fundamental rights which exist by virtue of authority derived from a source of a higher nature than state-granted "rights" derived from the exercise of a state granted privilege. The Contract Clause of the Federal Constitution prohibits the states from enacting any law that will impair "the Obligation of Contracts." U.S.Const. art. I, cl. 1. The federal remedial statute of § 1983 existed as the law of the land for the benefit of individuals under the Supremacy Clause long before Pennsylvania's Act of May 22, 1933. In *Murray v. City of Charleston, S.C.*, 96 U.S. 432, 446 (1878), this Court clearly stated that, "We have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable." Petitioner Brown contends the subject property is held in the one stage of its ownership not to be taxable, which is a federal-law issue. Since the trial court dismissed for lack of subject matter jurisdiction, this Court should assume all allegations in the Petitioners complaint are true. *Nelson v. Campbell*, 124 S.Ct. 2117, 2120 (2004).

This Court has held that declarations of trust agreements

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[2] *See Natural liberty*, Black's Law Dictionary, 6th Ed. 1990, at 919.

embodied in trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. *Coolidge v. Long*, 282 U.S. 582, 595 (1930). On many occasions this Court has held that a trustee of an express trust is *entitled* to sue as a real party in interest on behalf of trust beneficiaries. *See, Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 465 (1980)("[Trustees] have legal title, they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their right...."). Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties in interest for procedural purposes. Pennsylvania Rule of Civil Procedure 2002 provides the correlating rule for commencing a § 1983 action in state courts. Accordingly, the declaration of trust agreement empowered Petitioner Brown to "sue in courts of law or equity within the jurisdiction of the United States". U.S.Const.Amends. 5, 14. It is well established that state and federal courts have concurrent jurisdiction over § 1983 claims. *Howett v. Rose*, 496 U.S. 356 (1990); *Martinez v. California*, 444 U.S. 277, 283-284 n.7 (1980).

In *Monell v. New York City*, 436 U.S. 658, 690-691 (1978) this Court stated that, "[L]ocal governing bodies, therefore, can be sued directly under 1983 for monetary, declaratory, and injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that bodies officers." (31a, par. 19). Here, Petitioner Brown sued local governing bodies directly under § 1983 for allegedly taxing property which they are prohibited under the United States Constitution and laws. (23a-40a). Petitioner Brown contends that an adequate remedy under State law does not exist. (31a, par. 20). The trial court concluded that "Brown failed to exhaust his administrative remedies which is procedural prerequisite to conferring jurisdiction on this Court

for Brown's current action", and that it "does not have subject matter jurisdiction to hear the petition for Injunctive Relief or to entertain the complaint." (17a, par. 5-6).

The questions presented here are whether every § 1983 plaintiff must exhaust state administrative remedies before commencing a civil rights action in state court and whether the GCAL impairs the obligation of contract to the detriment of protected federal rights. These questions raise issues which pertain not only to the parties involved, but are very important to the public at large. As evidenced by its prior holdings, this Honorable Court clearly recognizes the federal interest in enforcing the supremacy of federal statutes which protect explicit [federal] constitutional guarantees. As more fully discussed below, since this Court's decision in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), state courts are divided on the issue of whether state administrative remedies must be exhausted before bringing a § 1983 action in state court, another important federal-law issue affecting individual rights and constitutional guarantees of due process and equal protection of the laws.

B. Proceedings Below.

Petitioner Brown filed a substantive 42 U.S.C. § 1983 action in the trial court on March 14, 2003 seeking injunctive, declaratory, and monetary relief. (23a-40a). A hearing was held on Petitioner Brown's Petition for Injunctive Relief on May 6, 2003 before the Honorable Thomas C. Branca. On May 12, 2003, Judge Branca issued a Decree dismissing Petitioner Brown's § 1983 Complaint and denying injunctive relief for "lack of subject matter jurisdiction". (15a-17a). On July 25, 2003, the trial court issued the Opinion of the Court. In its Opinion, the court issued a statement of facts along with a procedural history.

As the trial court stated in its Opinion of July 25, 2003,

Samuel James Brown III, a natural person, owned a piece of property located in Pennsylvania. (6a). On February 24, 1997, by virtue of a straw party transaction, an irrevocable, two-part declaration of trust agreement was drafted with respect to his disposing of all right, title, and interest in the subject property as a matter of choice. The trial judge stated that "the Declaration of Trust has no particular purpose ascribed therein." (6a). In contrast, Petitioner Brown suggests that, to dispose of property for the benefit of others is, in itself, a valid purpose for a trust agreement. The Opinion states that Brown transferred the property and various appurtenances thereto to his brother, acting in the capacity of a straw party trustee, for the sole purpose of reconveyance of legal title in the property to the Joint Tenant Trustees to be held for the benefit of named beneficiaries under express terms of the trust indenture. (7a). Samuel J. Brown III no longer owned the property as of February 24, 1997. Thereafter, on February 26, 1997, pursuant to powers imputed to them under terms of trust, the trustees nominated and appointed Petitioner Brown to serve with them in the capacity of a joint tenant trustee.

At the hearing, Petitioner Brown did assert that the trust agreement does not evidence the requisite corporate attributes to be designated as a taxable association as defined under federal law which goes to the merits of the dispute which have not been adjudicated. The subject realty, which did become part of the corpus of the trust agreement, is characterized in the Opinion as a duplex in which Petitioner Brown lived on the first floor and a tenant paying rent lived on the second. First, a trustee has authority over the entrusted property, and second, this Court has stated in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 553 (1972) that, "Property does not have rights, people have rights. The right to enjoy property without unlawful deprivation…is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account."

Petitioner Brown alleges in his complaint that the subject property is "excluded" from the scope of Pennsylvania taxing statutes such as the GCAL because it is "a document which the Commonwealth is prohibiting from taxing under the Constitution or statutes of the United States." (23a-24a, 26a, par. 8, 32a, par. 25) at issue here. As more fully discussed below, this is a completely different concept in law than that of a "taxpayer" asserting the right to a state-granted statutory "exemption" or alleging an improperly calculated amount of tax. The federal right to be free from unlawful contract impairment under color of State law is not subject to state legislative alteration and exists independent of the legislative right to grant "exemptions".

On May 12, 2003, the case was summarily dismissed by the trial court without going to the merits of the Petitioners independent federal-law claims. On June 11, 2003, the Petitioner filed an appeal in the Commonwealth Court. The Commonwealth Court affirmed the decision of the trial court. (2a-4a). On May 12, 2004 the Commonwealth Court denied Petitioners application for reargument. On June 2004, the Petitioner filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. On January 25, 2005, the Supreme Court of Pennsylvania, under its discretionary jurisdiction, denied Petitioner Brown's Petition for Allowance of Appeal and Application for Injunctive Relief. (1a). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

This is an appropriate case for consideration of this Court's certiorari jurisdiction for many reasons which are important to the public interest as well as to the parties directly involved. For instance, the highest courts in many of the states of this Union are divided on the federal question of whether a plaintiff seeking vindication of federal rights under § 1983 must

first exhaust state administrative remedies when bringing § 1983 actions in state courts. Some state courts say yes, some say no. Conflicting decisions on this important federal-law issue are proliferating rapidly as a result of this division. The "exhaustion" question is a critically important one that involves the proper construction and application of federal civil rights statutes in accordance with provisions of the U.S. Constitution. The division in state courts illuminates the fact that certain state courts are misinterpreting and misapplying prior Supreme Court decisions to the detriment of individual rights in violation of the Supremacy Clause. The invocation of the "Exhaustion Doctrine" is particularly troubling when used to dismiss § 1983 actions in state courts because the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. *Goldberg v. Kelly*, 397 U.S. 254 (1970). This case presents a timely and rare opportunity to provide this Court's guidance as to what the law is as it pertains to administrative prerequisites in bringing § 1983 actions within the jurisdiction of the United States. Any misapplication of the Exhaustion Doctrine unnecessarily creates confusion and the incentive to forum shop and litigate in overburdened federal courts. Nothing is more wasteful than litigation about where to litigate.[3]

The Commonwealth Court's determination that Pennsylvania law requires Petitioner Brown to initiate and exhaust state administrative remedies before filing a § 1983 suit appears to conflict with the Supreme Court's binding precedents in a line of cases including, in part, *Zinermon v. Burch*, 494 U.S. 113 (1990); *Felder v. Casey*, 487 U.S. 131 (1988), *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), *Monell v. New York City*, 436 U.S. 658 (1978), and *Monroe v.*

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[3] Quoting Justice Scalia's insightful observation in *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988)(Scalia, J., dissenting).

Pape, 365 U.S. 167 (1961). The decision also appears to misapply this Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995) to Petitioner Brown's substantive § 1983 suit. This Court has held that certain types of constitutional violations are immediately actionable under § 1983 when the wrongful action is taken. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

In the case *sub judice*, the Commonwealth Court has sustained the validity the GCAL as against the Petitioners claim of repugnance to the Federal Constitution and the Supremacy of 42 U.S.C. § 1983, another important reason for review, particularly where the Petitioner, as here, alleges that no adequate remedy exists under State law. (31a, par. 20). Here, the need for guidance from this Court is particularly acute because the Supreme Court of Pennsylvania is Pennsylvania's "court of last resort" and, under its discretionary authority, declined to grant Petitioner Brown's Petition for Allowance of Appeal. State law does not always provide an adequate remedy to vindicate all federal rights. It is well established that Section 1983 of Title 42 of the United States Code "was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate", but also to provide a federal remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 173-174 (1961); *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). In the absence of a binding precedent upon state courts by the Supreme Court on these important issues, judicial chaos reigns and overcrowded federal court dockets must accommodate many additional § 1983 claims based on barriers that certain state courts have imposed to screen out § 1983 actions. State court judges should not be permitted to arbitrarily choke off the federal right of access to state courts and screen out § 1983 actions by simply imposing an arbitrary requirement that every plaintiff initiate or

exhaust state remedies before filing a § 1983 action in state court.

I. The Question Of Whether Every § 1983 Plaintiff Must Exhaust State Administrative Remedies Before Commencing A Civil Rights Action Under 42 U.S.C. § 1983 In State Court Is A Federal Question.

The tension between the federal concern for individual rights and state autonomy has surfaced in recent years in the context of whether exhaustion of state administrative remedies is required in § 1983 actions. The question of whether exhaustion is required in all section 1983 actions brings the federal interest in effective enforcement of individual rights into conflict with the state interest in maintaining control over judicial and administrative processes.[4] Logically, there should be no conflict between the federal-law interest and the state-law interest with respect to individual rights. However, because enforcement of civil rights legislation is reserved in the congressional domain, the federal and public interest is to assure that state courts understand and apply federal law correctly. Indeed, in *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 364 (1989), this Court clearly stated a timeless principle that effects the public as well as the parties here:

> There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit [federal] constitutional guarantees, and [federal] constitutional challenges to state action, no less than pre-emption based challenges call into question

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[4] See generally Note, Exhaustion of Administrative Remedies in Section 1983 Actions Brought in State Court, 69 Iowa Il. Rev. 1037 (1984).

> the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.

Id. at 364. The supremacy of substantive federal rights is mandated by the Constitution. U.S.Const.art. VI; *McCulloch v. Maryland*, 17 U.S. 159, 213 (1819). When the state procedure interferes with the federal right, the supremacy clause mandates the displacement of the infringing state procedure. *See e.g. Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 361-362 (1952); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). In addition, the contract clause of the Federal Constitution prohibits the states from enacting any law that will impair the Obligation of Contracts [5]. Section 1983 provides the remedial statute to vindicate all federal rights guaranteed by the Fourteenth Amendment including the right to be from impairment under color of State law. While the general rule is that equity will not entertain an action where plaintiff has an adequate remedy at law, there is an exception to that doctrine existing where a taxing statute is made the subject of a constitutional challenge, and the absence an adequate statutory remedy. Under these circumstances, Pennsylvania's procedure requiring the initiation or exhaustion of state administrative remedies wrongfully interferes with the federal right to bring a § 1983 action in the first instance. In such a case, state rule conflicts with both the congressional objectives of § 1983 and the federal interest in uniformity of the application of federal statutes.

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[5] U.S.Const. art. I § 10, cl. 1: "No State shall...pass any...Law impairing the Obligation of Contracts."

A. A Conflict Exists Between The Highest Courts Of Many States As To The Applicability Of The Exhaustion Doctrine To Civil Rights Actions Commenced In State Courts And, Therefore, This Is An Important Question Of Federal Law.

In 1982, this Court held in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982), that "[B]ased on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." The *Patsy* decision did not settle the exhaustion question because the § 1983 suit had been brought in federal court. Thereafter, state courts split on whether a similar exhaustion rule applied when a plaintiff filed his section 1983 action in state court.[6] However, this Court has yet to decide whether the holding in *Patsy* applies to every civil rights action commenced in a state court, although in *Felder v. Casey*, 487 U.S. 131 (1988), the Court held that a state court adjudicating a section 1983 claim cannot insist on compliance with a state notice-of-claims provision because such a provision engrafts an unacceptable exhaustion requirement. The *Monell* and *Felder* rulings referenced above are particularly relevant to the federal-law issues raised in the case *sub judice* because it is a well established rule that the Legislature may not under the guise of modifying a remedy impair the obligation of a contract.[7]

To date, the state courts are divided on whether initiation

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[6] State and federal courts have concurrent jurisdiction over § 1983 claims. *Howett v. Rose*, 496 U.S. 356 (1990); *Martinez v. California*, 444 U.S. 277, 283-284 n.7 (1980).

[7] *See also* Part II, *infra*.

or exhaustion of a state statutorily-prescribed remedy is required before a § 1983 action may be commenced in state courts. Pursuant to the principle of "intrastate uniformity", this important rule should be clearly understood and uniformly applied in all state court systems. The overwhelming majority of state courts appear to have held that exhaustion is not required. By way of example, the highest courts having ruled in Alaska, Colorado, Louisiana, Indiana, Iowa, Kansas, Maryland, New Mexico, New York, and Ohio have held that exhaustion is not required in civil rights actions in state court.[8] In contrast, the highest courts in Oklahoma, Oregon and Wisconsin, as well as the Commonwealth Court of Pennsylvania have held that initiation or exhaustion of state administrative remedies is

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[8] *Diedrich v. City of Ketchikan et. al.*, 805 P.2d 362 (Alaska S.Ct. 1991)(exhaustion of administrative remedies not required as a prerequisite to maintaining in § 1983 claim); *Eberhandt v. Levasseur*, 630 So.2d 844 (La. App. 1993) (exhaustion not required in § 1983 actions in state courts); *King Ex. Rel. Jacob v. Secretary*, 774 N.E.2d 1008 (2002)(same); *Peterson v. Davenport Community School District*, 626 N.W.2d 99 (Iowa 2001)(same); *Prager v. State of Kansas*, 20 P.3d 39 (2001))(same); *Maryland Nat'l. Capital Park & Planning Comm'n v. Crawford*, 307 Md. 1, 511 A.2d 1079 (1986) (exhaustion not required in § 1983 actions in state court); *Leach v. New Mexico Junior College*, 45 P.3d 46 (N.M.App. 2002), *cert. denied*, No. 27, 411 (2002))(same); *NYC Coalition v. Giuliani*, 187 Misc. 2d 425 (2000))(same); *Peoples Rights Org. v. Montgomery*, 756 N.E.2d 127 (Ohio App. 2001)

See also Montoya v. City of Colorado Springs, 770 P.2d 1358 (Colo. App.), *cert denied*, 783 P.2d 838 (Colo. 1989) (exhaustion of administrative remedies governed by federal law and not required in § 1981 actions instituted in state court); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo. App. 1991) (exhaustion of state administrative remedies not required in § 1981 actions instituted in state court) (dictum).

mandatory before commencement of civil rights actions in their state court systems.[9]

Here, the Petitioner filed a substantive § 1983 action in a state court for actions taken under color of State law alleged to be unconstitutional. The trial court dismissed the complaint by concluding that the Petitioner had not initiated or exhausted "a statutory remedy that is mandatory and exclusive." (9a). In contrast, this Court held in *Monell v. New York City*, 436 U.S. 658, 690 (1978), that, "[l]ocal governing bodies, therefore, can be sued directly under 1983... where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers...". This issue is critical here because, as the *Monell* Court concluded, "municipalities simply cannot arrange their affairs on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officers under 1983 would prohibit any such arrangement." *Monell*, 436 U.S. at 700. Absent the right to bring a § 1983 action when a municipality does just that, they would be able to violate constitutional rights indefinitely. In addition, the Petitioner alleges that an adequate state remedy does not exist for purposes of the instant case. There is no counterpart to section 1983 under Pennsylvania law. *Cheryl S.*

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[9] *Murtagh v. Berks County Board of Assessment Appeals*, 715 A.2d 548 (Pa. Cmwlth. 1998); *Liddell v. Board of Com'rs. Of County of Cleveland ex rex. Board of Equalization of Count of Cleveland*, 46 P.3d 715, *cert. denied* (OK Civ. App. 2002)(State courts must refrain from granting relief under § 1983 when there is an adequate legal remedy); *Nutbrown v. Munn*, 811 P.2d 131 (Or. 1991) (exhaustion of state administrative remedies is required in § 1983 actions in state court challenging state's method of assessing and collecting taxes); *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, *cert. denied*, 479 U.S. 918 (1986) (exhaustion required); *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991) (same).

v. County of Bucks, Civ. No. 04-1880 (E.D. Pa. July 26, 2004). In Pennsylvania, the right to bring a substantive § 1983 action may be adequate in theory, however, it is not available in practice.

In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court explained "that 1983 was intended not only to 'override' discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights 'where the state law was inadequate', but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. 173-174. The impairment of the obligation of a contract under the guise of taxation imposed under color of State law constitutes a substantive constitutional violation actionable under § 1983 which is complete the moment wrongful action is taken. Because substantive due process is violated at the moment harm occurs, the existence of postdeprivation state remedies has been held not to bar a federal civil rights action based on substantive due process under color of state law. U.S.Const.Amends. 5, 14; 42 U.S.C. § 1983. *See also*, *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

Petitioner Brown respectfully suggests that state court judges may not legitimately claim to hold discretionary power over the federal-law rule governing whether the Exhaustion Doctrine is applicable to § 1983 actions commenced in state courts under circumstances where an adequate state remedy does not exist. Civil rights protections are held within the exclusive domain of Congress. The absence of a Supreme Court ruling on this important federal-law issue provides a vacuum of uncertainty concerning the availability and effect of the administration of substantive § 1983 actions commenced in state courts, especially when the adequacy of the state remedy has been called into question.

In sum, this Court's guidance on this rule is imperative

to assure that the Congressional intent and purpose of enacting 42 U.S.C. § 1983 and the mandatory commands of U.S.Const. art. VI do not continue to be preempted by state court judges who may sincerely disagree as to "what the law is" to which they are bound.

B. The Commonwealth Court Of Pennsylvania Erred by Misapplying This Court's ruling in *National Private Truck* to Petitioner Brown's substantive § 1983 action where an adequate remedy does not exist under Pennsylvania law.

The Commonwealth Court concluded in its Opinion of March 15, 2004 by stating that "because the trial court committed no clear error of law or an abuse of its discretion, the [Commonwealth] Court affirms based on the decision of the trial court judge, the Honorable Thomas C. Branca. (3a). The trial court decision to dismiss Petitioner Brown's § 1983 action was made immediately after an initial hearing was quickly scheduled for May 6. 2003 in response to the Petitioners application for injunctive relief. In the trial court's Decree of May 12, 2003, the trial court concluded that "Brown failed to exhaust his administrative remedies which is a procedural requisite for conferring jurisdiction on this Court for Brown's current [§ 1983] action. This Court does not have subject matter jurisdiction to hear the petition for injunctive relief or to entertain the complaint. *See, Aquarian Church of Universal Service v. County York*, 494 A.2d 891 (Pa. Cmwlth, 1985); *Erie County League of Women Voters v. Commonwealth of Pennsylvania Department of Environmental Resources*, 525 A.2d 1290 (Pa. Cmwlth. 1987). Plaintiff has not shown such extraordinary facts to allow this Court to take jurisdiction even though administrative remedies have not been exhausted. *See, National Private Truck Council, Inc. v. Oklahoma Tax*

Commission, 515 U.S. 582, 591, 115 S.Ct. 2351, 2357 n.6 (1993)." (17a).

In *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995) (hereinafter "National Truck"), this Court stated that "[w]e granted certiorari to resolve a conflict among state courts as to whether, in tax cases, state courts must provide relief under § 1983 when adequate remedies exist under state law." The *National Truck* Court was silent on the federal question involving the applicability of the Exhaustion Doctrine to substantive § 1983 actions in state courts where, as here, a municipal taxing statute is made the subject of a substantial constitutional challenge in the absence of an adequate, complete, or certain state statutory remedy. The state can claim no legitimate interest in condoning the collection taxation in excess of what the law commands. Implied in the *National Truck* decision is that state courts must provide equitable relief under § 1983 where state administrative remedies are inadequate to afford protection to the federal rights. Such equitable intervention may prevent irreparable harm and multiplicity of suits where, as here, the property being assessed is held in the stage of ownership not to be taxed. This Court's limited holding in *National Truck* should not be applied when there is a constitutional challenge to a taxing statute and an adequate remedy under State law does not exist.

C. Pennsylvania Does Not Provide An Adequate Remedy Under its GCAL To Redress The Petitioner's Independent Federal Claims.

Under the law in the Commonwealth of Pennsylvania, the official assessment is considered prima facie valid.[10] An appeal may be taken to the Montgomery County Board of Assessment Appeals (hereinafter "Appeals Board"), a quasi-judicial body granted limited authority under the GCAL, the tax enabling statute. The Department has the authority to make all assessments of real property for taxation purposes. One of the boards duties is hearing assessment appeals. *See*, Title 72 § 5341.14.

Appellant Brown's cause of action arises under the Contracts Clause of the Federal Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[11] Petitioner Brown seeks to restrain the appropriate officials of the Commonwealth from the enforcement of a tax statute, which, it is alleged, violates both the Constitutions of the United States and the Commonwealth of Pennsylvania. This action raises no question of an overassessment or an improper exemption in connection with the tax not does it challenge any

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[10] Assessment Law and Procedure in Pennsylvania, Goodman, 1997 Edition at 17.

[11] *State ex. rel. Payson v. Chillingworth*, 122 Fla. 339, 165 So. 264 (1936) ("Statutes creating or abolishing conditions precedent to the bringing of actions are not void as impairing the obligations of contracts where they do not have the effect of destroying the right or preventing suit thereon; but the legislature may not under the guise of changing the remedy impair the obligation of a contract by arbitrarily imposing a condition precedent to enforcement."). *See also generally*, 16A C.J.S. Constitutional Law § 381 at 300.

of the mechanics involved in the calculation of the tax; on the contrary, it directly attacks the constitutionality of the tax statute and the want of power in the legislature to levy such a tax.

Certainly the Appeals Board is not a competent tribunal to pass upon questions of the validity or constitutionality of statutes and the determinations of such questions by such administrative tribunals was clearly not in the legislative purview. The mere fact that a remedy may exist is not sufficient; the remedy must be adequate and complete. The remedy provided by the Fiscal Code is far from being adequate where a challenge is made not to the mechanics of tax calculations but to the power of the legislature to levy any tax and to the validity of the statute imposing the tax.

At the administrative-agency level, the Pennsylvania dispute resolution process can not take cognizance of the federal issues at all, let alone resolve all the issues in the case. By its nature, it goes only to the matters addressed in the making of the assessment as distinguished from the alleged wrong that Appellant Brown identifies in his Amended Complaint. In addition, the Appeals Board has no authority to issue injunctive, declaratory relief, or monetary damages to redress the deprivation of federal rights if the Petitioner's allegations prove to be correct. Therefore, an adequate remedy does not exist for any plaintiff in Petitioner Brown's capacity and circumstances under Pennsylvania law.

II. The Question Of Whether Pennsylvania's General County Assessment Law, Codified At 72 P.S. § 5020-101 *Et. Seq. As Amended*, Impairs The Obligation Of Contract Embodied In A Trust Deed To Which Petitioner Brown Is A Real Party In Interest In Violation Of The Contract Clause Of Article I, § 10, Or The Due Process Or Equal Protection Clauses Of The Fourteenth Amendment Is An Important Federal Question.

The Contract Clause of the Federal Constitution prohibits the states from enacting any law that will impair "the Obligation of Contracts." [12] Natural liberty gives all mankind the right to dispose of property after the manner which gives them the most happiness.[13] Individuals have the right to create, preserve, and enforce private agreements. Petitioner Brown's claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations. *Atlantic Coast Line v. Phillips*, 332 U.S. 168, 170 (1947).

There are several basic principles upon which Petitioner Brown relied upon when petitioning this Honorable Court for a writ of certiorari on this issue. In *Coolidge v. Long*, 282 U.S. 582 (1931) this Court restated the timeless rule that, "[I]t is well understood that, when the jurisdiction of this Court is invoked to determine whether a state law impairs the right of the litigant under a prior contract, or whether the state is depriving him of

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[12] U.S.Const. art. I, § 10: No State shall…pass any…Law impairing the Obligation of Contracts.

[13] *See Natural liberty*, Black's Law Dictionary, 6th Ed. 1990, at 919.

property without due process of law in violation of the Fourteenth Amendment, and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution", citing *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79, 86 (1924) and other cases. *Coolidge*, 282 U.S. 582 at 597.

With respect to establishing the federal judicial power over state laws, this Court has concluded on similar matters involving the contract clause the following: "The doctrine that this court possesses paramount authority when reviewing the final judgement of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution... has been affirmed in numerous other cases." (case cites omitted). *See e.g. Stearns v. State of Minnesota*, 179 U.S. 223, 233 (1900); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Martin v. Hunter's Leasee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Commonwealth of Virginia*, 19 U.S. (6 Wheat) 264 (1821).

And finally, it is long settled that, to be obnoxious to the contract clause, a statute must act upon the contract so as to interfere with the right of enforcement. *Coolidge v. Long*, 282 U.S. 582, 634-635 (1931)(Roberts, J. dissenting). It is a well-established rule that the Legislature may not under the guise of modifying a remedy, impair the obligation of a contract. *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *See also, Green v. Biddle*, 8 Wheat. 1 (1823); *McCracken v. Hayward*, 2 How. 608, 612 (1844); *State ex. rel. Payson v. Chillingworth*, 122 Fla. 339, 165 So. 264 (1936). *See also*, 16A. C.J.S. Constitutional Law § 381 at 300. These rules are necessary because "nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions." *Commissioner v. Newman*, 159 F. 2d 848, 851 (5th Cir.

1947)(Hand, C.J., dissenting) It is this foundation of this Court's case law upon which a writ of certiorari is prayed for by Petitioner Brown.

Under the Contract Clause, the Supreme Court has the duty of protecting even from legislative violation, those contracts which the Federal Constitution placed beyond legislative control. It is well established that trust deeds and declaration of trust agreements are contracts within the meaning of the Federal Constitution. *Coolidge v. Long*, 282 U.S. 582, 595 (1931). The Petitioners in *Coolidge* were trustees, similar to Petitioner Brown, alleging that enforcement of the State statute would be repugnant to the Contracts Clause and the Due Process Clause of the Fourteenth Amendment. Massachusetts imposed a form of inheritance tax, or succession tax upon the remainder interests of the sons. The underlying principle supporting the tax is that such right [the right of succession] is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not privilege, and as such is protected from legislative encroachment by constitutional guarantees. *Id.* at 603. Liberty and property interests are at stake here as they were in *Coolidge*. The tax here is incident to ownership of real estate as distinguished from a succession tax in *Coolidge*.

In *Murray v. City of Charleston*, 96 U.S. 432, 446, this Court acknowledged that, "[W]e have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable." Petitioner Brown contends the subject property is held in the one stage of its ownership not to be taxable within the jurisdiction of the United States. Pennsylvania's General County Assessment Law imposes an annual assessment tax upon all real estate in Montgomery County regardless of which stage

of ownership the property is held. Section 1983 provides a remedy for those claiming the deprivation of rights under color of State law.

Express constitutional prohibitions upon the states in Article I, § 10, Amends. 5, 14 enforceable under 42 U.S.C § 1983 should serve to prevent enforcement of any statute that would alleviate the commitments of one party to a contract or make enforcement of the contract unreasonably difficult.[14] The primary intent was behind the drafting of the clause was to prohibit states from adopting laws that would interfere with the contractual arrangements between private citizens.[15] Banks and financiers required some assurance that their credit arrangements made primarily under the regulation of the Commerce Clause would not be abrogated by state legislatures. Similarly, private citizens required some assurance that their basic constitutional rights to acquire, own, enjoy or dispose and hold private property subject to terms embodied in trust contracts would not be impaired or abridged under color of State law. Such a proposition regarding private property rights stems from fruit of the tree of natural liberty because "among the inalienable rights of the citizen is that of liberty of contract." *Frisbie v. United States*, 157 U.S. 160, 165 (1895). The right to contract about one's affairs is part of the liberty of the individual protected by the Fifth and Fourteenth Amendments, and this is settled law under the decisions of the Supreme Court of the United States and is no longer open to question. *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525, 545 (1923); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972);

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[14] Edward S. Corwin's, The Constitution and What It Means Today 103 (Rev. ed. By H. Chase & C. Ducat 1973). *See* generally, B. Wright, The Contract Clause, 57 Harv.L.Rev. 512, 621, 852 (1944) (three part article).

[15] B. Wright, The Growth of American Constitutional Law, 41 (1967).

Allied Structual Steel Co., v. Spannus, 438 U.S. 234 (1978).

Based on the historical obligation this Court holds under the Contract Clause, the Bill of Rights, and the Fourteenth Amendment, Petitioner Brown prays for this Court to consider issuing a Writ of Certiorari and consider temporary injunctive relief pending trial on the merits. The importance of the federal questions raised in this petition affect the public and the immediate parties in a manner that cannot be overstated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S. James Brown
371 West Main Street
Trappe, Pennsylvania 19426
(610) 489-3913

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

S. JAMES BROWN, JOINT TENANT TRUSTEE
WITH THE RIGHT OF SURVIVORSHIP,
Petitioner,

v. No. 506 MAL 2004

MONTGOMERY COUNTY,
MONTGOMERY COUNTY BOARD OF
ASSESSMENT, MONTGOMERY COUNTY
TAX CLAIM BUREAU, M. ELIZABETH
MCBRIDE, DEPUTY TREASURER FOR
THE TAX CLAIM BUREAU AND AS AN
INDIVIDUAL, BOROUGH OF TRAPPE,
EDWARD W. GILLESPIE, TAX COLLECTOR
FOR THE BOROUGH OF TRAPPE AND AS AN
INDIVIDUAL, AND PERKIOMEN VALLEY
SCHOOL DISTRICT,
Respondents

Petition for Allowance of Appeal form the Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 25th day of January, 2005, the above-captioned Petition for Allowance of Appeal is **DENIED**. The Application for an injunction is also **DENIED**.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

S. James Brown, Joint Tenant Trustee with the right of survivorship,

Appellant

v.

No. 1317 C.D.
Submitted: October 31, 2003

Montgomery County, Montgomery County Board of Assessment, Montgomery County Tax Bureau, M. Elizabeth McBride, Deputy Treasurer for the Tax Claim Bureau, and as an individual, Borough of Trappe, Edward W. Gillespie, Tax Collector for the Borough of Trappe, and as an individual, Perkiomen Valley School District

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: March 15, 2004

S. James Brown appeals from a May 12, 2003 final decree of the Court of Common Pleas of Montgomery County denying Brown's petition for a preliminary injunction and dismissing his civil rights complaint. Brown contends that certain real property held in a purported trust, of which he is a trustee, should be exempt from real estate taxes levied pursuant to The General County Assessment Law, Act of May 22, 1933, P.L., 853, *as amended,* 72 P.S. §§5020-101-5020-602. Brown

also contends that by levying and attempting to collect those taxes, Appellees committed an unconstitutional impairment of contract and violated his rights protected by the Fifth and Fourteenth Amendments to the U.S. Constitution and Title 42, Sections 1981 and 1983 of the U.S. Code.

The trial court held that Brown failed to avail himself of available administrative procedures of obtaining a tax exemption by filing an appeal with the Montgomery County Board of Assessment Appeals. Because Brown failed to exhaust his administrative remedies the court concluded that it lacked jurisdiction to entertain Brown's petition for injunctive relief or the complaint and accordingly denied the petition and dismissed the complaint. The issues in dispute are purely legal in nature, and the Court's review of the trial court's final decree therefore is limited to determining wither the trial court abused its discretion or committed a clear error of law. *Rukuson v. Dantzler,* 812 A.2d 776 (Pa. Cmwlth. 2002). Upon review, the Court is convinced that the rial court's final decree of May 12, 2003 and opinion of July 25, 2003 in support of the final decree thoroughly and succinctly address the issues in this appeal. Thus because the trial court committed no clear error of law or an abuse of its discretion, the Court affirms based on the decision of the Honorable Thomas C. Branca entered in *S. James Brown, Joint Tenant Trustee with the right of survivorship v. Montgomery County, et al.,* Court of Common Pleas of Montgomery County, No. 2003-04688.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

S. James Brown, Joint Tenant Trustee with the right of survivorship,

Appellant

No. 1317 C.D. 2003

v.

Montgomery County, Montgomery County Board of Assessment, Montgomery County Tax Bureau, M. Elizabeth McBride, Deputy Treasurer for the Tax Claim Bureau, and as an individual, Borough of Trappe, Edward W. Gillespie, Tax Collector for the Borough of Trappe, and as an individual, Perkiomen Valley School District

PER CURIAM

ORDER

AND NOW, the 15th day of March, 2004, the court affirms the May 12, 2003 final decree and July 25, 2003 opinion entered by the Court of Common Pleas of Montgomery County in *S. James Brown, Joint Tenant Trustee with the right of survivorship v. Montgomery County, et al.*, No. 2003-04688.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

S. James Brown, Joint Tenant Trustee with the right of survivorship, Appellant	:	
v.	:	No. 1317 C.D. 2003
Montgomery County, Montgomery County Board of Assessment, Montgomery County Tax Bureau, M. Elizabeth McBride, Deputy Treasurer for the Tax Claim Bureau and as an individual, Borough of Trappe, Edward W. Gillespie, Tax Collector for the Borough of Trappe, and as an individual, Perkiomen Valley School District	:	

PER CURIAM

ORDER

NOW, May 12, 2004, having considered appellant's application for reargument before the Court en banc, and Perkiomen Valley School District's answer, the application is denied.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION -- EQUITY

S. James Brown, Joint Tenant Trustee with the right of survivorship	:	
Plaintiff	:	
vs.	:	No. 2003-04688
	:	
Montgomery County, *et al.*	:	
Defendants	:	

OPINION OF THE COURT

Branca, J. **July 25, 2003**

Plaintiff appeals from the Court's Order and Decree dated May 12, 2003, which denied his Petition for Injunctive Relief and dismissed his complaint.

I Statement of Facts and Procedural History

S. James Brown("Brown") owned a piece of property located at 371 West Main Street, Trappe, Montgomery County, Pennsylvania ("subject property"). (N.T. 5/6/2003 at 44.) On February 24, 1997, Brown drafted a declaration of trust entitled Kepoint Preservation Trust ("Purported Trust") and later, with the agreement of members of his family, named the beneficiaries of the trust and the trustees. (N.T. 5/6/2003 at 19, 22; Exhibit A to complaint.) His father and great aunt are the beneficiaries and his mother and brother are joint-trustees with rights of survivorship. (N.T. 5/6/2003 at 19; Exhibit B to complaint.) Although there are beneficiaries of the trust, the Declaration of Trust has no particular purpose ascribed therein.

(Exhibit B to complaint.) Brown then transferred the property and various appurtenances thereto to his brother R. Craig Brown, a straw-party trustee who immediately re-conveyed legal title in the property to the trustees. (N.T. 5/6/2003 at 15.) Thereafter, on February 26, 1997, the trustees nominated and appointed Brown as trustee for life. (Exhibit A to complaint.) The term of the trust is 45 years and is unlikely that the beneficiaries, who are in their 60s and 80s respectively, will survive the term of the trust. (N.T. 5/6/2003 at 25.) Brown asserts that no individual owns the property at this time and no one has an equitable interest in the property. (N.T. 5/6/2003 at 23, 24, 44.) He alleges that the subject property is the *corpus* of the purported trust. The property is a duplex and at the time of the hearing, Brown lived on the first floor and a tenant paying rent to the Purported Trust lived on the second. (N.T. 5/6/2003 at 39.)

Brown's primary complaint is that the realty should be exempt from taxation under the Real Estate of Tax Assessment laws. He alleges hat the defendants have deprived him of certain property rights without due process of law because they are engaged in "levying, assessing [and] collecting" taxes on the "entrusted" property, which he claims by virtue of being "entrusted" is "excluded" from taxation under Pennsylvania law. Yet, he acknowledges that a claim for exemption from local and county real estate taxes of the property was not filed with the Montgomery County Board of Assessment Appeals pursuant to the exclusive statutory remedies provided in The General County Assessment Law, P.S. §5020-101 *et seq*. The tax rolls indicate that the property is listed and there is no exemption of record. (N.T. 5/6/2003 at 42-43.) Brown admits that since the transfer of subject property to the purported trust, no local and county real estate taxes have been paid. As a result the failure to pay said taxes, at the time of the hearing, a

total tax lien in the amount of $26,755.58 was outstanding and has been levied against the property from 1997 through 2002. (N.T. 5/6/2003 at 38.) The subject property was not, at the time of the hearing, in a tax sale. After the hearing on the Petition for Injunctive Relief, this Court entered a decree denying the request for injunctive relief and dismissing the complaint. A copy of this Court's decree dated May 12, 2003 is attached hereto as Exhibit "A."

II Issues Raised on Appeal

The first paragraph of Brown's concise statement under Pa.R.A.P. 1925(b) states: "Appellant brown objects to the Court's Conclusions of Law as the reason creating the necessity for the instant appeal to the Commonwealth Court of Pennsylvania No. 1317 CD 2003." He follows this with examples of the Court's mistakes. He claims that the Court erred in its conclusions that:

A. Brown failed to exhaust his administrative remedies, and therefore this Curt does not have subject matter jurisdiction to hear the petition for relief or to entertain the complaint; and

B. The Plaintiff has not shown such extraordinary facts to allow this Court to take jurisdiction even though administrative remedies have not been exhausted.

III Discussion

A. Brown failed to exhaust his administrative remedies and therefore its conclusion that it does not have subject matter jurisdiction to hear the petition for relief or to entertain the complaint is correct.

Brown assigns as error in Court's conclusion that he failed to exhaust his administrative remedies. As noted above, he alleges that the decedents deprived him of certain property rights without due process of law through their assessment of

taxes on the property that is the *corpus* of the purported trust. Without making a determination as to the validity of the purported trust (whose purpose is certainly unclear and at least raises a concern that is appears to be solely a sham created in some misguided or fraudulent attempt[1] to avoid paying taxes) this Court notes first that Brown did not dispute the defendants' assertion that he must obtain an exemption pursuant to the exclusive statutory remedies provided in 72 P.S.§5020-201 *et seq.* He also admitted that a claim for exemption from local and county real estate taxes of the property was not filed with the Montgomery County Board of Assessment Appeals. Moreover, he stipulated that the tax rolls indicate that the property is listed, and there is no exemption of record. Brown admits further that since the transfer of subject property to the purported trust, no local and county real estate taxes have been paid.

All real estate is presumed taxable unless an exemption is granted. 72 P.S. §5020-201. The process for obtaining an exemption is delineated in 72 P.S. §5020-204. Where, as here, the legislature has provided a statutory remedy that is mandatory and exclusive, equity is without power to give relief to the party who has failed to avail himself of that remedy. *Aquarian Church of Women Voters v. Commonwealth of Pennsylvania Department of Environmental Resources,* 525 A.2d 1290 (Pa. Cmwlth. 1987). Therefore, this Court is without jurisdiction to entertain the complaint or the petition for preliminary injunction as exclusive jurisdiction would lie with the Board of Assessment Appeals pursuant to the statutory remedy provided in 72 P.S.§5020-101 *et. seq.*

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[1] The determination of which is not necessary given the basis of this Court's decision.

B. The Plaintiff has not shown such extraordinary facts to allow this Court to take jurisdiction even though administrative remedies have not been exhausted.

In the alternative, Brown asserts that the Supreme Court in *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 512 U.S. 582, 591, 115 S.Ct. 2351, 2357 n.6 (1995) gives this Court ability to impose injunctive relief. The Supreme Court states in *National Private Truck Council.* "We simply do not read §1983 to provide for injunctive or declaratory relief against a state tax, either in federal or state court, when an adequate legal remedy exists." Footnote 6 is appended to this statement and reads as follows:

As our opinions reveal, there may be extraordinary circumstances under which injunctive or declaratory relief is available even when a legal remedy exists. For example, if the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, [or] throw a cloud upon the title, equity might be invoked. As we have made clear, however, the multiplicity of suits rationale for permitting equitable relief extends only to those situation where there is a real risk of numerous suits between the same parties, involving the same issues of law or fact. Thus, if a state court awards a refund to a taxpayer on the ground that the tax violates the Federal Constitution, but state tax, injunctive and declaratory relief might then be appropriate. In such circumstances, the remedy might be thought to be inadequate.

Id. at 2357 n.6. (citations omitted).

Thus, while Brown asserts that this Court could take jurisdiction of this matter, he failed to allege let alone prove my facts that wold allow this Court to conclude as a threshold matter extraordinary circumstances exist that render the available remedy inadequate. Therefore, this mater was

rightfully dismissed for Brown's failure to exhaust his administrative remedies.

IV. Conclusion

Before other owners of real estate aware of Brown's seemingly enviable position of owning a duplex and collecting rent while avoiding the payment of taxes scurry out to create their own "trusts," this Court urges all to take heed of the prophecy of Benjamin Franklin in 1789 when he wrote, "[I]n this world nothing is certain but death and taxes."[2] In the meantime, this Court's Order and Decree dated May 12, 2003 should be **AFFIRMED**.

BY THE COURT:

s/_____

Thomas C. Branca,

Copies of the above Opinion
mailed on 7/28/03 to:
Philip Newcomer, Esquire
Lawrence Sager, Esquire
Wendy Rothstein, Esquire
S. James Brown, *pro se*

s/ Christy A. Kramer
Secretary

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[2] Benjamin Franklin's letter to M. Leroy, 1789, John Bartlett, *Familiar Quotations*, 227-28, (Christopher Morley, Ed., Garden City Publishing Co., Inc. 1944)(1937).

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL DIVISION

S. James Brown, Joint Tenant Trustee: with right of survivorship	:	
Appellant	:	
	:	No. 03-04688
vs.	:	
Montgomery County, *et al.*	:	
Defendant	:	

ORDER

AND NOW, this 16th day of June, 2003, pursuant to Pennsylvania Rule of Appellate Procedure No. 1925 (b), the Court hereby **ORDERS** and **DIRECTS** appellant to file of record in this Court and to serve a copy upon the undersigned Judge within fourteen (14) days of the date of this Order a Concise Statement of Matters Complained Of with regard to instant appeal to the Commonwealth Court of Pennsylvania.

BY THE COURT:

S/_____
Thomas C. Branca,

Copy of the above Order
mailed to 6/16/03 to:
Wendy G. Rothstein, Esquire
Lawrence Sager, Esquire
Philip Newcomer, Esquire
S. James Brown, *pro se*
S/ Christy A. Kramer
Secretary

IN THE COURT OF COMMON PEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION – EQUITY

S. James Brown, Joint Tenant Trustee with the right of survivorship Plaintiff	:	
vs.	:	No. 2003-04688
Montgomery County, *et al.* Defendants	:	

ORDER

AND NOW, this 10th day of June, 2003, upon consideration of the plaintiff's Application to Transfer the Above Referenced Matter and Record of Case Number 03-04688 to the Proper Division of the Court of Common Pleas of Montgomery County or proper Court of this Commonwealth, it is clear to the Court that the plaintiff misapprehends the basis for the Court's Order and Decree of May 12, 2003. The Court of Common Pleas Civil Division, in Equity or Law, does not have jurisdiction to entertain the plaintiff's complaint because the plaintiff has failed to exhaust his administrative remedies. Therefore, it is hereby **ORDERED** that said Application is **DENIED**.

BY THE COURT:

S/_____

Thomas C. Branca,

Copies of the above Order
mailed on 6/11/03 to:
Court Administrative
Wendy G. Rothstein, Esquire
Lawrence Sager, Esquire
Philip Newcomer, Esquire
S. James Brown, *pro se*

*s/*_____
Secretary

IN THE COURT OF COMMON PEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL ACTION – EQUITY

S. James Brown, Joint Tenant Trustee: with the right of survivorship	:	
Plaintiff	:	
vs.	:	No. 2003-04688
	:	
Montgomery County, *et al.*	:	
Defendants	:	

DECREE

AND NOW, this 12th day of May, 2003, upon consideration of plaintiff's complaint, the petition for preliminary injunctive relief and after a preliminary hearing on the matter, the Court makes the following:

Findings of Fact

1. Plaintiff (Brown) alleges that he was owner of certain real property located at 371 W. Main Street, Trappe, Montgomery County, PA (subject property). In 1997, he transferred his ownership of the subject property to R. Craig Brown. R. Craig Brown transferred the property to the Kepoint Preservation trust (Purported Trust). Thereafter, plaintiff S. James was named Joint Tenant Trustee with right of survivorship.
2. The subject property is a duplex. The second floor apartment is occupied by a tenant who pays rent to Purported Trust. The first floor apartment is used and/or occupied by Brown.
3. Brown alleges that the subject property became the "corpus" of the purported trust.
4. Brown alleges that the defendants have deprived him of certain property rights without due process of law

because they are engaged in "levying, assessing [and] collecting" taxes on the "entrusted" property when this property is "excluded" from taxation under Pennsylvania law.

5. Brown admits that a claim for exemption from local and county real estate taxes of the property was not filed with the Montgomery County Board of Assessment Appeals pursuant to the exclusive statutory remedies provided in 72 P.S.§5020-201 *et seq.*
6. Brown admits that since the transfer of subject property to the purported trust, no local and county real estate taxes have been paid.
7. As a result of the failure to pay said taxes, a total tax lien in the amount of $26,755.58 has been levied against the subject property.
8. The subject property is not currently in a tax sale.

Based on the aforementioned facts, the Court finds as follows:

Conclusions of Law

1. At best, Brown's complaint is inartfully pled, but attempts to assert a civil rights claim based on an assertion of deprivation of property through taxation without due process of law.
2. Regardless of Brown's characterization, the true nature of the claim is one for exemption from local and county real estate taxes of the subject property.
3. The facts presented by Brown at the hearing established that Brown's claim is based solely upon the defendants' exercise of their legally mandated duties, *i.e.* assessing and collecting taxes.
4. The law provides due process for a claimed property exemption through the appeal procedure enunciated in 72 P.S. §5020.201 *et seq.*, the initial step of which is an application for exemption to the Montgomery County

Board of Assessment Appeals, a process that Brown never utilized.

5. Brown failed to exhaust his administrative remedies, which is procedural prerequisite to conferring jurisdiction on this Court for Brown's current action.
6. This Court does not have subject matter jurisdiction to hear the petition for Injunctive Relief or to entertain the complaint. *See, Aquarian Church of Universal Service v. County York*, 494 A.2d 891 (Pa. Cmwlth. 1985); *Erie County League of Women Voters v. Commonwealth of Pennsylvania Department of Environmental Resources*, 525 A.2d 1290 (Pa. Cmwlth. 1987).
7. Plaintiff has not shown such extraordinary facts to allow this Court to take jurisdiction even though administrative remedies have not been exhausted. *See, National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 591, 115 S.Ct. 2351, 2337 n.6 (1993).

Accordingly, it is hereby **ORDERED and DECREED** that Petition for Preliminary Injunctive Relief is **DENIED** and the plaintiff's Complaint is **DISMISSED**.

BY THE COURT:
S/_____
Thomas C. Branca,

Copies of the above Order
mailed on 5/13/03 to:
Court Administration
Wendy G. Rothstein, Esquire
Lawrence Sager, Esquire
Philip Newcomer, Esquire
S. James Brown, *pro se*
S/ Christy A. Kramer
Secretary

PROTHONOTARY, MONTGOMERY COUNTY, PA
DATE 04/14/05
DOCKET INFORMATION

Brown S. James TR Versus Montgomery County
Case # 03-04688 Date Commenced 03/14/03 Judge Dickman
Casetype Complaint-Civil Action

Plaintiff Brown S James Tr
Attorney Newcomer Philip
371 W. Main Street Trappe PA 19404
Defendant Montgomery County
Attorney Newcomer Philip
PO Box 311 Norristown PA 19404
Defendant Montgomery County BD Assnt
Attorney Newcomer Philip
PO Box 311 Norristown PA 10404
Defendant Montgomery County Tax Claims Bur
Attorney Newcomer Philip
PO Box 311 Norristown PA 10404
Defendant McBride M Elizabeth
Attorney Newcomer Philip
PO Box 311 Norristown PA 10404
Defendant Trappe Boro
Attorney Sager Lawrence
525 Main St Trappe PA 19426
Defendant Gillespie Edward W
45 Paddock Way Trappe PA 19426
Defendant Perkiomen Valley School Dist
Attorney Rothstein Wendy

Docket Information Back to Top

03/14/03 Certification of Serv of Notice to Defend, Pltfs Complt with exhibits on 3/14/03

03/14/03	Demand For Jury Trial By Pltf
03/14/03	Affidavit of S. James Brown, Joint Tenant Tr & Marge Brown Joint Tenant Tr in Support of Pltf Claim for Relief to Enforce Terms of Tr
03/21/03	Served Deft Borough of Trappe on 3/18/03
03/21/03	Served Deft Edward W. Gillespie on 3/18/03
03/21/03	Served Deft Perkiomen Valley School District on 3/18/03
03/21/03	Served Deft Montgomery County of 3/18/03
03/21/03	Served Deft Montgomery County Board of Assessments on 3/18/03
03/21/03	Served Deft Montgomery County Tax Claim Bureau on 3/18/03
03/21/03	Served Deft M. Elizabeth McBride on 3/18/03
03/26/03	Appearance of Wendy G. Rothstein Esq. fdor Dept Perkiomen Valley School Dist
03/31/03	Notice of Pltf Browns Mailing Address
04/07/03	Preliminary Objections of Defts Montgomery County, Montco Board of Assessment, Montco Tax Claim Bureau & Elizabeth McBride
04/07/03	Certification of Serv of Prel Obj Sent on 4/7/3
04/08/03	Certification of Serv of Notice of Intention to Take Default Judgt Sent on 4/8/03
04/09/03	Certification of Serv of Prel Objs of Deft to Pltfs Complt on 4/9/03
04/09/03	Preliminary Objections of Deft Perkiomen Valley School Dist
04/10/03	Preliminary Objections of Defts Trappe Boro & Ed Gillespie
04/10/03	Certification of Serv of Prel Objs to Complt with Moving Party Cover Sheet on 4/9/03
04/17/03	Certification of Serv of Pet for Injunctive Relief & Memo of Points, Rule to Show

	Cause why Prel Inj Should Not Issue, Notice, Order & Writ Sent on 4/17/03
04/17/03	Petition for Prel Injunctive Relief By Pltf
04/17/03	Memorandum of Points & Authorities in Support of Pet for Prel Injunctions by Pltf
04/17/03	Petition for Prel Injunctive Relief By Pltf
04/17/03	Memornadum of Points & Authorities in Support of Pet for Prel Injunctions By Pltf
04/23/03	Certification of Serv of Order Sent of 4/22/03
04/21/03	Appearance of Lawrence Sager Esq. For Deft Trappe Boro & Edward Gillespie
04/24/03	Order fo 4/22/03 - Kens, Ca Copies Sent 4/22/03
04/28/03	Memornadum of Law In Support of Pltf Browns Response to Preliminary Objs of Defts
04/28/03	Answer of Pltf to Above Named Defts Prel Objs
04/28/03	Certification of Serv of Resp to Prel Objs & Memo of Law & Order for Overruling Prel Objs & Cert of Serv on 4/28/03
05/01/03	Answer to Pet for Injunctive Relief by Defts Montgomery County & Montco Board of Assessment, Montgomery County Tax Claim Bureau & McBride
05/02/03	Praecipe for Argument Appealable - Prel Objs
05/02/03	Answer and New Matter By Deft to Pltfs Pet For Prel Injunctive Relief
05/01/03	Certification of Serv of Ans of Defts Montgomery County Montgomery Bd of Assmt Montgomery Coiunty Tax Claim Bureau & Deputy Treasure M. Elizabeth McBride to Pltfs (Cont Next Entry)
05/02/03	Memorandum of Law (Perkiomen Valley

	School District) in Opposition to Pltfs Pet for Preliminary Injunctive Relief
5/02/03	Memorandum of Law in Support of Preliminary Objs of Deft Perkiomen Valley School District
5/02/03	Certification of Serv of Answer of Perkiomen Vly Sch Dist to Pltfs for Prel Injunctive Relief & Memo Of Law In Support Thereof on 5/2/03
5/02/03	Certification of Serv of Prae for Arc on 5/2/03
5/02/03	Certification of Serv of Memo of Law in Opposition to Pet for Prel Injunctive Relief on 5/2/03
5/02/03	Certification of Serv of Memo of Law in Support of Prel Objs of Deft Perkiome Vly Sch Dist on 5/2/03
5/05/03	Certification of Serv of Brief in Opposition Sent on 5/5/04
5/05/03	Brief in Opposition to Pet for Prel Injunctive Relief By Deft
5/06/03	Answer of Defts Edward Gillespie & Boro of Trappe to Pltfs Pet for Injunctive Relief
5/14/03	Decree of 5/12/03 - Branca, J Pet for Prel Injunction Relief is Denied & Pltfs Complt is Dismissed copies sent 4/13/03
5/22/03	Notice of Application to Transfer Above Referenced Matter & Record of Case to Proper Division of Court of Common Please of Montg County of Court of Commonwealth
5/22/03	Certification of Serv of Application to Transfer Above Referenced Matter & Record of Case Sent on 5/22/03
6/12/03	Order of 5/10/03 Pltfs App to Transfer Denied Branca J. Copies sent 6/11/03

06/17/03	Order of 6/16/03 Branca J Copies Sent 6/16/03
6/11/03	Certification of Serv of Notice of Appeal on 6/11/03
06/11/03	Notice of Appeal to Commonwealth Ct of PA from Order of 5/12/03 Branca J
07/01/03	Notice of Appeal to Commonwealth Ct of PA No 1317 CD 2003
06/30/03	Certification of Serv of Statement of Matter Complained Sent on 6/16/03
06/30/03	Statement of Matters Complained of With Regard to Instant Appeal to Commonwealth Court of PA By Appellant S. James Brown
07/28/03	Testimony Taken Before Hon. Thomas C. Branca J on 5/6/03
07/29/03	Notice of Exhibits
07/29/03	Paper Forwarded to Commonwealth Ct. of PA By Cert Mil 702 2410 0005 1816 1167
03/17/04	Received Record and Memo Opinion Per Curiam of 3/15/04 No 1317 CD 2003
02/16/05	Received Order of 1/25/05 Appeal Denied
02/28/05	Received Record and From Comm Ct. of PA Docketed at 1317 CD 2003

End of Data

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CIVIL DIVISION

S. James Brown, Joint Tenant Trustee with the right of survivorship	:	: Civil Action-Law
Plaintiff	:	: No._____
vs.	:	: Jury Trial Demanded
Montgomery County	:	
Montgomery County Board of Assessment	:	
Montgomery County Tax Claim Bureau	:	
M. Elizabeth McBride, Deputy Treasurer for the Tax Claim Bureau, and as an individual	:	
Borough of Trappe	:	
Edward W. Gillespie, Tax Collector for the Borough of Trappe, and as an individual	:	
Perkiomen Valley School District	:	
Defendants	:	

CIVIL RIGHTS COMPLAINT UNDER 42 U.S.C. § 1983

COMES NOW S. James. Brown, Joint Tenant Trustee with the right of survivorship, hereby sues the Defendants *in the nature of trespass* for arbitrarily and unlawful acts under color of State law that deprive the Plaintiff of rights, privileges, and immunities secured to him by the Federal Constitution and laws. See 42 U.S.C. §§ 1981(a)(b)(c) and 1983 (involving the equal right to make and enforce contracts and remedial protection from impairment under color of State law). The Defendants separate decisions and subsequent acts from 1997-2003 have impaired the Plaintiff's obligation of trust contract

by unlawfully imposing state taxing authority upon "a document which the Commonwealth is prohibited from taxing under the Constitution or statutes of the United States", pursuant to Pennsylvania statutes as an "excluded transaction" from tax. The Defendants *hold* a total "want of power to tax" in this case.

The Plaintiffs' Complaint is specifically intended to invoke the Equal Protection Clause as well as the two constitutional types of Due Process claims whereby the wrongful deprivation of either a "liberty interest" or "property actionable under 42 U.S.C. § 1983 is complete when the wrongful action is taken. The first type incorporates specific protections defined in the Bill of Rights. The second type refers to "substantive due process" which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them". As to these two types of claims, the constitutional violation actionable under 42 U.S.C. § 1983 is complete when the wrongful action is taken[3]. Accordingly, this action is intended to simultaneously enjoin the Defendants from levying, assessing, collecting or otherwise imposing state taxing power in any form, upon the declaration of trust entitled "Kepoint Preservation Trust", (hereafter KEPOINT) or any real parties in interest or property *held* subject thereto.

In support of this Complaint, Plaintiff respectfully avers as follows:

1. This is an action *in the nature of a trespass* under 42 §§ U.S.C. 1981, 1983, and 1988 for damages, declaratory

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[3] ***Zinermon v. Burch*, 494 U.S. 113, 126-127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).**

and injunctive relief resulting from the deprivation under color of law of the State of Pennsylvania of a right, privilege, and immunity secured to Plaintiff by the Fifth and Fourteenth Amendments to the United States Constitution. Injunctive relief and damages are sought under the provisions of 42 U.S.C. §§ 1981(a)(b)(c), 1983, 1988, and Pa. C.R.P. 1531. Declaratory relief is sought under the provisions of 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 1983, 42 Pa. C.S.A. § 7531-7551, and Pa. C.R.P. 1602.

2. The individual's equal right to "make and enforce contracts" and right to be free from unlawful impairment under color of State law are statutorily protected under 42 U.S.C. §§ 1981, 1983.

3. Defendants, acting under color of law of the State of Pennsylvania, have imposed state delegated taxing power, without statutory authority upon KEPOINT, a "document which the Commonwealth is prohibited from taxing under the Constitution or statutes of the United States".

4. Jurisdiction is conferred upon this Honorable Court 42 Pa. C.S.A. § 912 and 42 Pa. C.S.A. §§ 5302, 5304 as well as the case law of the Commonwealth. (See e.g., *Murtaugh v. County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993); *Balshy v. Rank*, 507 Pa. 384, 490 A.2d 415 (1985)).

5. Venue is established in Montgomery County, Pennsylvania because the affidavits of trust which embody the transaction or occurrence in dispute out of which this cause of action arose, were notorized in Montgomery County, Pennsylvania, and involves the assignment of individual rights in relation to real property legally described as 371 West Main Street, Trappe, Montgomery County, Pennsylvania or parcel

number 23-00-00781-00-6.

6. Plaintiff, S. James Brown, Joint Tenant Trustee with the right of survivorship has standing and capacity to sue pusuant to Pa. R.C.P 2002(a)(b) because (1) he is a real party in interest whom is acting in his official fiduciary or representative capacity, which capacity is disclosed in the caption and in the caption and in the Plaintiff's initial pleading, and (2) he is a real party in interest with whom a contract has been made for the benefit of another. **See Exhibit "A", Certificate of Trusteeship.** As such, he is held subject to terms and conditions of an unincorporated, *inter vivos*, "private trust agreement to convey which is executory in nature with mutual promissory obligations" which does not evidence "an executed conveyance of an interest in real property to a 'person' (individual, corporation, or association) other than the grantor". The immediately preceeding words are intended to be limited to their well established technical meanings as strictly defined in statutory construction for public purposes.

7. The declaration of trust document in dispute is merely *entitled* "Kepoint Preservation Trust (hereafter KEPOINT) and is an "organization" that cannot be arbitrarily forced to descend to the level of an "association" for public purposes.

8. By terms and conditions imposed under KEPOINT, rights in expectancy involving real property, are *held* exclusively for the benefit of named beneficiary(ies) within the "constitutional exemption involving the obligation of contracts", implied under Section 2 of the taxation and finance article of the Constitution of the

Commonwealth of Pennsylvania[4].

9. All of the "real" Defendants herein are adult citizens of the "COMMONWEALTH OF PENNSYLVANIA". Named Defendants consist of both real and artificial entities and are more specifically identified as follows:

(a) Defendant MONTGOMERY COUNTY is a political subdivision of the COMMONWEALTH OF PENNSYLVANIA that is controlled by the provisions of the Constitution and statutes of the United States in respect to national taxation and correlating constitutional restrictions. Pursuant to Pa. R.C.P. 422, service was made to Michael D. Marino, Esquire, the acting chairman of the Montgomery County Board of Comissioners. The last known address of the Defendant is Court House, P.O. Box 311, Norristown, PA. 19404.

(b) Defendant MONTGOMERY COUNTY BOARD OF ASSESSMENT is an artificial entity created under Pennsylvania statutes. The last known address of the Defendant is Court House, P.O. Box 311, Norristown, PA. 19404.

(c) Defendant MONTGOMERY COUNTY TAX CLAIMS BUREAU is an artificial entity created under and by the authority of the provisions of the Act of 1947, P.L. 1368 known as "Real Estate Law", as amended. The last known address of the Defendant is Court House, P.O. Box 311, Norristown, PA. 19404.

(d) Defendant M. Elizabeth McBride, an

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[4] **See explanation in the Pennsylvania Law Encyclopedia, Taxation, Chapter 4 § 93.**

individual, is the acting Deputy Treasurer for the MONTGOMERY COUNTY TAX CLAIMS BUREAU. Defendant is hereby sued in her official and individual capacity. The only known address of the Defendant is c/o MONTGOMERY COUNTY TAX CLAIMS BUREAU, Court House, P.O Box 311 Norristown, PA 19404.

(e) Defendant BOROUGH OF TRAPPE is a political subdivision of the "COMMONWEALTH OF PENNSYLVANIA", that is controlled by the provisions of the Constitution or statutes of the United States in respect to national taxation and correlating constitutional restrictions. The last known address of the Defendant address is 525 Main Street, Borough Hall, Trappe, PA 19426.

(f) Defendant Edward W. Gillespie, an individual, is the acting Tax Collector for the incorporated BOROUGH OF TRAPPE. Defendant Gillespie is hereby sued in his official and individual capacity. The last known address of the Defendant is 45 Paddock Way, Trappe, PA 19426.

(g) Defendant PERKIOMEN VALLEY SCHOOL DISTRICT is an artificial entity functioning as a local governing body created under Pennsylvania statutes that is controlled by the provisions of the Constitution or statutes of the United States in respect to national taxation and correlating constitutional restrictions. Pursuant to Pa. R.C.P. 422, service was made to Priscilla Seir, the acting Superintendent of the PERKIOMEN VALLEY SCHOOL DISTRICT. The last known address of the Defendant is 3 Iron

Bridge Drive, Collegeville, PA. 19426.

10. Defendants *hold* a "total want of power to tax" in this case.

11. Defendants' decisions and subsequent acts during the years 1997-2003, resulted in the ongoing detriment of rights, privileges, and immunities secured by the Constitution and statutes of the United States to the Plaintiff, creating a federal cause of action in tort pursuant to 42 U.S.C § 1983.

12. The unlawful acts of Defendants have caused injury to Plaintiff in tort.

13. In support of the Plaintiff's claim for relief, certain facts submitted in affidavit form and attached documents, are incorporated by reference herein and throughout, as Exhibit "B". The affidavit consists of relevant facts regarding the document in dispute such as (1) initial disposition of all interest in certain property and simultaneous declaration of trust terms and conditions (2) change in economic interests of relevant parties (3) legal rights of the real parties in interest (4) beneficial interests of real parties in interest. **See Exhibit "B".**

14. At all times relevant hereto and at all times since February 26, 1997, Plaintiff has been and continues to serve as a Joint Tenant Trustee, with others, in relation to certain real property in dispute in Montgomery County, Pennsylvania, legally described as follows: 371 West Main Street, Trappe, Pennsylvania, or more specifically, ALL THAT CERTAIN tract of land with the dwelling and other improvements erected thereon; SITUATE on the North side of Main Street, in the Borough of Trappe, County of Montgomery, and Commonwealth of Pennsylvania, being more fully bounded and described as follows, to wit: BEGINNING at a point in the center of Main Street (50 feet wide) a

corner of lands of Pierre H. Schimek; thence leaving said road and along lands of Pierre H. Schimek, the two following courses and distances: (1) North 34 degrees 55 minutes East 159.5 feet to a point; (2) 41 degrees 45 minutes East 72.33 feet to a point; thence along the lands of Michael Marsella and Doris Marsella, his wife, South 51 degrees 25 minutes East 124.55 feet to a point; thence along the lands of John F. Ward and Margaret A. Ward, his wife, and lands of William and Marion E. Kirkland, his wife, South 41 degrees 15 minutes West 218.48 feet to a point in the center of Main Street; thence in said road North 58 degrees 30 minutes West 108.00 feet to a point, the place of beginning. CONTAINING 0.6 acres. BEING PACEL NUMBER 23-00-00781-00-6.

See Exhibit "B" (Deed/Indenture for Pennsylvania Made on the 7th day of September, 1983 between Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, of Washington D.C., and Samuel J. Brown III).

15. Under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, the Plaintiff was *entitled not* to be deprived of rights, privileges, and immunities or "entrusted property" embodied in his contractual relations and obligations.

16. Under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, the Plaintiff was *entitled not* to be individually or jointly forced into "involuntary servitude" or be otherwise indebted by acts of Defendants not authorized under Pennsylvania statutes.

COUNT I (UNDER 42 U.S.C. § 1983)

17. Paragraphs 1 through 15 hereof are repeated by Plaintiff and incorporated by reference as if fully set forth herein, as are all attached exhibits.

18. The acts of Defendants under color of State law, to levy, assess, or collect money from the Plaintiff, as a party holding a liberty interest and contractual fiduciary obligation, deprived the Plaintiff of certain "property" and rights, privileges, and immunies secured to him by the Constitution of the United States of America and amendments thereto, and damaged the Plaintiff in an amount in excess of $50,000 in actual and irreparable damages, plus costs and counsel fees.

19. Local governing bodies (and local officials sued in their official capacitities) can be sued directly under 42 U.S.C. § 1983 for monetary, declaratory, and injunctive relief in those situations, where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement or decision, or custom officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy[5].

20. Plaintiff has an inadequate remedy at law that fails to (1) avoid multiplicity of suits (annual) (2) prevent irreparable injury to the Plaintiff involving his right and fiduciary duty to fulfill his lawful calling and contractual obligation absent arbitrary and unlawful impairment by Defendants (3) provide necessary equitable relief available in the form of a declaratory judgement and injunctive relief.

21. Defendants were and still are engaged in the process of levying, assessing, or collecting taxes for their

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[5] ***Monell v. New York City*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).**

respective territorial districts or taxing authorities. **See Exhibit "C".**

22. On multiple occasions, Defendant Montgomery County Tax Claim Bureau threatened to expose entrusted property at public tax sale. **See Exhibit "D".**

23. Defendants, by and through their concerted decision(s) and acts to mislabel and tax the KEPOINT contract as a "taxpayer", or "business trust association", committed such acts outside the scope of Pennsylvania taxing statutes.

24. Defendants unlawful actions have caused injury to Plaintiff in tort by causing the unlawful impairment of his individual liberty of contract and correlating civil rights privileges, and immunities.

25. The KEPOINT trust document, evidences an "excluded transaction" as expressly excluded from taxation under the Pennsylvania Realty Tax Act, namely 72 Pa. C.S. § 8102-C.3(2), and Code of Ordinces, Borough of Trappe, § 3-2076(2) and is necessarily *impliedly excluded* from all other Pennsylvania statutes imposing tax obligations on real property "subject to taxation" owned or held by a "person" (individual, corporation, or association) or "taxpayer", as defined for public purposes under federal law.

26. Defendants actions under color of State law are herein alleged to be in violation of federal constitutional rights, privileges and immunities secured to Plaintiff. Accordingly, under 42 U.S.C. § 1983, the Defendants are liable to the Plaintiff.

27. Unless enjoined by an order of this Honorable Court, the Defendants herein will continue to engage in the unlawful levying, assessing, or collecting tax to the detriment of the obligation, rights, privileges, immunities, and liberty of contract of the Plaintiff

secured to him by the Federal Constitution and laws, resulting in irreparable harm to the Plaintiff and underlying contract rights *held* by other real parties in interest under the declaration of trust in dispute.

WHEREFORE, Plaintiff S. James Brown, Joint Tenant Trustee prays that this Honorable Court secure the quiet enjoyment of constitutional rights, privileges, and immunities entitled to the Plaintiff and other real parties in interest for the term of 45 years, and enter relief herein as follows:

a) That a money judgement be entered in favor of Plaintiff and against the Defendants herein, jointly and severally, pursuant to 42 U.S.C. §§ 1983 and 1988 in the sum in excess of $50,000 for actual damages, plus costs and counsel fees, and another sum in excess of $50,000 for punitive and irreparable damages, to punish Defendants and to deter Defendants and others from similar conduct in the future; and

b) That a Declaratory Judgement be ordered establishing the rights and legal relations of the parties and prevent a further invasion of Plaintiff's legal rights as further set forth in Count II, and

c) That a Preliminary Injunction be immediately ordered, to be made permanent, as further set forth in Count III, and

d) Order such other relief which this Honorable Court deems equitable and just.

COUNT II (DECLARATORY JUDGEMENT)

28. Paragraphs 1 through 27 hereof are repeated by Plaintiff and incorporated by reference as if fully set forth herein,

as are all attached exhibits.

29. The facts set forth in paragraphs above and within the attached exhibits demonstrate the existence of an actual controversy relating to the legal rights and duties of the respective parties justify this Honorable Court's granting a declaratory judgment to determine the exempt status of the assessed property.

30. Plaintiff has an inadequate remedy at law that fails to (1) avoid multiplicity of suits (annual) (2) prevent irreparable injury to the Plaintiff involving his right and fiduciary duty to fulfill his lawful calling and contractual obligation absent arbitrary and unlawful impairment by Defendants (3) provide necessary equitable relief available in the form of a declaratory judgement and injunctive relief.

WHEREFORE, Plaintiff S. James Brown, Joint Tenant Trustee prays that this Honorable Court secure the quiet enjoyment of constitutional rights, privileges, and immunities entitled to the Plaintiff and other real parties in interest for the term of 45 years, and enter relief herein as follows:

a) That this Honorable Court enters a Declaratory Judgement establishing the rights, duties, and legal relations of the parties, and

b) That this Honorable Court enters an order declaring that the private trust agreement to convey entitled KEPOINT PRESERVATION TRUST is a document which the Commonwealth and its political subdivisions are prohibited from taxing under the Constitution and statutes of the United States to establish the exempt status of the entrusted property; and

c) Declare that the current tax levies and/or assessments entered upon said property held

subject to the KEPOINT document by the Defendants are UNCONSTITUTIONAL, NULL and VOID and have the Prothonatary STRIKE such tax levies and/or assessments from this Honorable Court's docket and/or all applicable records within the Commonwealth of Pennsylvania; and

d) Order the Defendants to immediately discontinue any action previously taken to levy, assess, or collect taxes against the KEPOINT document or real parties in interest thereto and remove any liens wrongfully attached to entrusted property.

COUNT III (INJUNCTIVE RELIEF)

31. Paragraphs 1 through 30 hereof are repeated by Plaintiff and incorporated by reference as if fully set forth herein, as are all attached exhibits.

32. On August 26, 2002, as the Plaintiff prepared his appeal contending that federal courts had subject matter jurisdiction to the Supreme Court of the United States, the attorney for the Montgomery County Tax Claim Bureau mailed a letter to Trustee Brown advising the Joint Tenant Trustees, that 2002 "is the last year that the Tax Claim Bureau will voluntarily remove the property from the sale" [public tax sale], which would, if carried forth as threatened, result in irreparable injury to rights, privileges, immunities, liberty, and property interests secured to Plaintiff and other real parties in interest by the Fifth and Fourteenth Amendments to the Constitution of the United States.**See Exhibit "E"**.

33. Plaintiff believes that he has a high probability of success in this lawsuit because:

a) "Private trust agreements to convey which are

executory in nature with mutual promissory obligations" which do not evidence "an executed conveyance of an interest in real property to a 'person' (individual, corporation, or association) other than the grantor", and the real parties in interest to the agreement thereto, are exempt from the imposition of the Pennsylvania Realty Transfer Tax Act as "excluded transactions", and are *impliedly excluded* from all other statutes imposing tax obligations. This is because KEPOINT, as such, evidences "a document which the Commonwealth is prohibited from taxing under the Constitution or statutes of the United States".

b) The trust document in dispute neither expressly or impliedly evidences ANY of the features of a "business trust association" as interpreted by the PA DEPARTMENT OF REVENUE for public purposes. The Department interprets a business trust as a trust with an objective to carry on business and divide gains and has the following features: (a) the treatment of beneficiaries as associates (b) the treatment of interest in the trust as personal property (c) the free transferability of interest in the trust (d) management of the trust by the beneficiaries alone or in conjunction with the trustee (f) continuity of life (g) liability for the debts of trust limited to trust property.

c) Black's Law Dictionary 7th Ed. (1999), at page 1474, defines the word "taxpayer" as "one who pays or is subject to a tax" or is taxable. (i.e. a "person" or individual, corporation, or

association). Real parties in interest are not subject to tax in their named capacities to a document which the Commonwealth and its political subdivisions are prohibited from taxing under the Constitution and statutes of the United States.

d) The defined term, "association", under **72 Pa. C.S. §§ 8102-C**, *specifically excludes* a "private trust", and "joint tenancy" as defined under **§ 91.101.** A "business trust" is defined at **15 Pa.C.S. § 9501(a)(1)** as "an association organized as a trust" and at **15 Pa.C.S. § 102**, as "A trust subject to Chapter 95".

34. Plaintiff has an inadequate remedy at law that fails to (1) avoid multiplicity of suits (annual) (2) prevent irreparable injury to the Plaintiff involving his right and fiduciary duty to fulfill his lawful calling and contractual obligation absent arbitrary and unlawful impairment by Defendants (3) provide necessary equitable relief available in the form of a declaratory judgement and injunctive relief.

35. Unless enjoined by an order of this Honorable Court, the Defendants herein will continue to engage in the unlawful levying, assessing, or collecting tax to the detriment of the obligation, rights, privileges, immunities, and liberty of contract of the Plaintiff secured to him by the Federal Constitution and laws, resulting in irreparable harm to the Plaintiff and underlying contract rights *held* by other real parties in interest under the declaration of trust in dispute.

WHEREFORE, Plaintiff S. James Brown, Joint Tenant Trustee prays that this Honorable Court immediately order a Preliminary Injunction, to be made permanent, to secure the

quiet enjoyment of constitutional rights, privileges, and immunities entitled to the Plaintiff and other real parties in interest, and enter relief herein as follows:

a) That a temporary restraining order be entered herein restraining all Defendants from proceeding to enforce any levy, assessment, or collection effort against KEPOINT, or real parties in interest thereto.

b) That each of the Defendants herein be enjoined from further attempting to levy, assess, or collect taxes against the private trust agreement to convey entitled KEPOINT PRESERVATION TRUST during the initial term of trust of 45 years.

c) That each and every Defendant herein be enjoined from authorizing any property held subject to KEPOINT such as that which is legally described as 371 West Main Street, Trappe, Montgomery County, Pennsylvania, to be sold at any current or future Public Tax Sale.

d) That each and every Defendant take action to VACATE any tax lien, assessment and/or collection effort against the property described as 371 West Main Street, Trappe, Montgomery County, Pennsylvania, and furthermore said Defendants are enjoined from taking any future action to levy, assess, or collect tax in relation to the any property held subject to the terms and conditions of the above referenced declaration of trust; and

e) That all injunctions entered herein be made permanent, and

f) That this Honorable Court enter such other relief as would be equitable and just.

Respectfully submitted,

_____

S. James Brown, Joint Tenant Trustee
Plaintiff

JURY DEMAND

A trial by jury is demanded on all counts averred in this Complaint.

_____

S. James Brown, Joint Tenant Trustee
Plaintiff

VERIFICATION

I verify that statements made in this Complaint are true and correct. I understand that false statements made herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

_____

S. James Brown, Joint Tenant Trustee
Plaintiff

No. 04-1432

IN THE

Supreme Court of the United States

S. JAMES BROWN, JOINT TENANT TRUSTEE,
Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT, PERKIOMEN VALLEY SCHOOL DISTRICT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Petitioner, S. James Brown ("Brown"), has filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, after failing to gain approval from the courts of Pennsylvania for attempting to avoid lawful real estate taxation by placing his real property into a "trust."

According to Brown's civil action Complaint and the record developed in the Court of Common Pleas of Montgomery County, Pennsylvania, the relevant facts and procedural history of this case are as follows.[1] From September 7, 1983, to September 24, 1997, Brown was the owner of certain real property located at 371 West Main Street in Trappe, Montgomery County, Pennsylvania, or parcel number 23-00-00781-00-6 (hereinafter, "the Subject Property"). (Record 18a-21a.) The Subject Property is located within the taxing districts of the various Respondents in this case, including Perkiomen Valley School District.

On February 24, 1997, Brown executed a "Declaration of Trust" and other documents that he claims created the "Kepoint Preservation Trust." (Record 18a-20a.) On that date, Brown conveyed the Subject Property to R. Craig Brown, his brother, as a "straw party mediator." *Id.* Brown's brother, in turn, reconveyed the Subject Property to Kepoint Preservation Trust and simultaneously appointed W. Regan Brown and Marge Brown, Brown's brother and mother, respectively, as "Joint Tenant" Trustees of the Kepoint Preservation Trust, to hold legal title to the Subject Property. (Record 20a.) On February 26, 1997,

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[1] It is the understanding of the undersigned counsel that the Record from the Pennsylvania proceedings has not yet been transmitted to this Court. All citations to the Record are therefore taken from the Reproduced Record filed by Brown in the Commonwealth Court of Pennsylvania.

two days after Brown's original conveyance of the Subject Property, Brown was "unanimously" nominated by W. Regan Brown and Marge Brown to serve as a "Trustee for life" of the Kepoint Preservation Trust. (Record 24a.) Thus, Brown presently claims to be one of three "joint tenant trustees" of Kepoint Preservation Trust. (Record 25a-32a.)

The claimed "beneficiaries" of the trust are Elizabeth Brown and Samuel J. Brown, Sr., Brown's great aunt and father, respectively. (Record 17c-18c.) However, the trust has been arranged so that the trustees may change or add beneficiaries as they should desire. (Record 26c.) Notwithstanding the above, Brown still resides on the first floor of the residence located on the Subject Property, as is confirmed by the Petitioner's address listed on the record of this case. (Record 39c-40c.) (*See also* Brown's Petition for a Writ of Certiorari.) A third party resides on the second floor of the residence and pays rent to Brown pursuant to a lease agreement. (Record 40c.)

In each year from 1997 through 2003, the Respondents, including Perkiomen Valley School District, taxed Kepoint Preservation Trust, the present registered title owner of the Subject Property, for the property pursuant to the Pennsylvania General County Assessment Law. *See* 72 P.S. §5020.101, *et seq.* ("GCAL"). Inasmuch as the taxes were not paid, the Montgomery County Tax Claim Bureau placed liens on the Subject Property, and scheduled numerous tax sales that were subsequently continued. The property taxes have since been paid, under protest.

Brown then initiated this action on or about March 14, 2003, by filing a three-count Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania, at docket number 2003-04688. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 23a-40a.) Brown's Complaint asserted claims for

declaratory judgment and injunctive relief, as well as a claim pursuant to 42 U.S.C. § 1983 as a result of the Respondents' taxation of the Subject Property pursuant to the GCAL. *Id.* Brown's Complaint sought, *inter alia*, monetary damages; declaratory relief; an injunction preventing the Respondents from enforcing any levy, assessment or collection; and the issuance of an order vacating any tax lien, assessment and/or collection effort against the Subject Property. *Id.*

At the trial court level, the crux of Brown's argument was that the Respondents improperly taxed the Kepoint Preservation Trust because the trust was a "document" that is excluded from taxation under a different Pennsylvania taxing statute, the Real Estate Transfer Tax Act, 72 P.S. §8101-C, *et seq.* (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 32a, ¶ 25.) However, the Pennsylvania Real Estate Transfer Tax Act and its exclusions have no application to this case, inasmuch as the relevant taxes were not levied upon the transfer or conveyance of the Subject Property, but rather, were levied upon the property itself pursuant to the GCAL.

The Respondents, including Perkiomen Valley School District, filed timely Preliminary Objections to Brown's Complaint, as well as an Answer to his Petition for Preliminary Injunctive Relief. The Respondents asserted, *inter alia*, that Brown's action should be dismissed because he failed to exhaust all available statutory and administrative remedies for challenging the taxation of the subject property. *See* 72 P.S. §5020-511. Specifically, Section 5020-511 of the CGAL requires a taxpayer challenging taxation under the General County Assessment Law to "apply for redress" by proceeding to a hearing before a three-member board of assessment appeals.

On May 6, 2003, the trial court, per the Honorable Thomas C. Branca, held a full hearing on the

merits of Brown's Petition for Preliminary Injunctive Relief. (Record 1c-74c.) By Decree dated May 12, 2003, the trial court denied Brown's Petition, and pursuant to the Respondents' Preliminary Objections, also dismissed Brown's Complaint. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 15a.) Among other things, the trial court concluded that it lacked jurisdiction over the subject-matter of the Complaint and the Petition for Injunctive Relief, due to Brown's failure to exhaust the administrative remedies set forth under the GCAL. *Id.* In its subsequent opinion of July 25, 2003, the trial court further noted that in the pleadings and at the hearing, "Brown did not dispute the defendants' assertion that he must obtain an exemption pursuant to the exclusive statutory remedies provided in 72 P.S. §5020-201 *et seq.*" (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 9a.) The trial court also noted Brown's admission that he had filed no claim for tax exemption, and that there was no record of such an exemption for the Subject Property on the tax rolls. *Id.*

Brown then appealed the decision of the trial court to the Commonwealth Court of Pennsylvania, which affirmed the trial court's Decree in a Memorandum Opinion and Order dated March 15, 2004. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 2a-4a.) Brown's subsequent Application for Reargument was denied by the Commonwealth Court of Pennsylvania on May 12, 2004. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 5a.)

Thereafter, Brown filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, seeking a reversal of the decision entered by the Commonwealth Court. On January 25, 2005, the Supreme Court of Pennsylvania denied Brown's Petition, as well as the Application for an injunction that he had also filed with the court. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 1a.)

Brown has now filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, seeking a reversal of the decisions entered by the courts of Pennsylvania, holding that a taxpayer may not avoid lawful real estate taxation simply by placing taxable real property into a "trust."

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari filed by Petitioner, S. James Brown, Joint Tenant Trustee, should be denied. As an initial matter, in order for a Writ of Certiorari to be issued, Brown must demonstrate that the Supreme Court of Pennsylvania has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" has "decided an important question of federal law that has not been, but should be, settled by this Court;" or has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10. None of these events have occurred.

First, the law permits corporations and other artificial entities such as trusts to appear in federal courts only through licensed counsel. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 195, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Here, Brown brings his Petition for a Writ of Certiorari on behalf of the Kepoint Preservation Trust as its "Joint Tenant Trustee." However, Brown is not a licensed attorney, and therefore, he may not act *pro se* or as counsel for any party other than himself. Because Brown is participating in the unauthorized practice of law, his Petition should be denied.

Second, the Pennsylvania General County Assessment Law, 72 P.S. §5020.101, *et seq.* ("GCAL"),

does not impair or violate any of the rights of Brown or the Kepoint Preservation Trust under the Constitution of the United States. Brown asserts that the act of taxing the Subject Property violates the Contract Clause of the United States Constitution because it "impairs the obligation of contract embodied in a trust deed." However, Brown has failed to demonstrate, at any point in these proceedings, that the Kepoint Preservation Trust is a "contract" within the meaning of Article I, Section 10 of the Constitution. To the contrary, the taxes that were levied upon the Subject Property were not imposed upon the transfer or conveyance of the property pursuant to a "contract," but rather, were imposed on the real estate itself pursuant to the GCAL. Furthermore, Brown has failed to demonstrate how or why any contractual obligations have been impaired through taxation by the Respondents. In the absence of such proof, this Court has consistently held that real property is the appropriate subject of taxation by the states, whether the property is held by a natural person, a corporation, a trust or another entity. Therefore, Brown's assertion that the GCAL is unconstitutional is without merit, and his Petition should be denied.

Finally, Brown's action was appropriately dismissed as a result of his failure to exhaust the administrative remedies established by Pennsylvania for challenging taxation under the CGAL. Specifically, any challenges to taxation under the GCAL are required to be submitted first to the appropriate administrative body, namely, a three-member Board of Assessment Appeals, before resorting to the courts of Pennsylvania. *See* 72 P.S. §5020.511. Such state administrative remedies for challenges to taxation have been explicitly approved by this Honorable Court and cannot be circumvented by a taxpayer simply by re-characterizing the claim as a Constitutional challenge under Section 1983. *See National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 115 S.Ct.

2351, 132 L.Ed.2d 509 (1995). Inasmuch as Brown failed to exhaust the administrative remedies available to him under Pennsylvania law, his action was appropriately dismissed. Accordingly, his Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. Standard.

Review on a writ of certiorari is not a matter of right, but of this Court's discretion. U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Here, Brown requests the issuance of a Writ of Certiorari following the denial of his Petition for Allowance of Appeal by the Supreme Court of Pennsylvania, which is the court of last resort in Pennsylvania. Therefore, pursuant to United States Supreme Court Rule 10, Brown must demonstrate that the Supreme Court of Pennsylvania has either "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" that it has "decided an important question of federal law that has not been, but should be, settled by this Court;" or that it has "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* It is respectfully submitted that the Petitioner cannot demonstrate that any of the aforementioned conditions have been met. Accordingly, Brown's Petition for a Writ of Certiorari should be denied.

II. Brown's Petition For A Writ of Certiorari Should Be Denied Because He Cannot Represent Kepoint Preservation Trust *Pro Se* In This Action.

Although it did not form the basis of any of the Pennsylvania courts' decisions to dismiss or uphold the dismissal of this action, Perkiomen Valley School District renews its argument that Brown is not able to represent Kepoint Preservation Trust in this case because he is not a licensed attorney. Brown claims to pursue this action and his Petition for a Writ of Certiorari as the "Joint Tenant Trustee" of Kepoint Preservation Trust, and asserts that he is entitled to sue "as a real party in interest on behalf of the trust beneficiaries." (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 6, citing *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 465 n. 14, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).)[2] Although it may be true, as Brown suggests, that trustees generally possess legal title in the assets of trust property, that they manage the assets of the trust, and that they are the real parties in interest to a controversy regarding the assets of the trust, Brown cites no authority in support of his contention that a trustee may represent the interests of the trust *pro se* by appearing in court without the assistance of an attorney. Indeed, even in *Navarro*, the only case cited by Brown on this issue, the trustee was represented by counsel. *Id.* at 459.

28 U.S.C. §1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." This Court has observed, however, that the law permits corporations and other artificial entities to appear in

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[2] Notably, Brown does not state whether the other "Joint Tenant Trustees" of the Kepoint Preservation Trust consent to or approve of his pursuit of this action.

federal courts only through licensed counsel. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993), citing *Osborn v. President of Bank of United States*, 9 Wheat. 738, 829, 6 L.Ed. 204 (1824), *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1308 (2d Cir. 1991) (Section 1654 "does not allow for unlicensed laymen to represent anyone else other than themselves."). Although the undersigned counsel has been unable to find any Supreme Court cases in which the above rule was specifically applied to matters involving a trustee, at least two United States Courts of Appeals have held that trustees must obtain counsel to pursue claims involving the trust. *See Knoefler v. United Bank of Bismarck*, 20 F.3d 347, 348 (8th Cir. 1994); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987). *See also Appeal of Manderson*, 113 Pa. 631, 634, 6 A. 893, 894 (1886) (Under Pennsylvania law, a trustee has a duty "to employ counsel, and, as incident thereto, to appropriate so much of the trust-estate as [is] necessary to reasonably compensate him for his services.").

It should be noted that prior to bringing the within action in the Court of Common Pleas of Montgomery County, Brown initiated a separate action in the United States District Court for the Eastern District of Pennsylvania on behalf of Kepoint Preservation Trust, seeking to avoid the imposition of realty transfer taxes. (*See Kepoint Preservation Trust Org., by and through J. Brown, Joint Tenant Trustee v. D. Michael Fisher, et al.*, United States Court of Appeals for the Third Circuit, No. 01-3708 (June 26, 2002), attached hereto in Appendix at 1a.) The District Court dismissed Brown's Complaint pursuant to the Tax Injunction Act, 28 U.S.C. §1341, and Brown filed an appeal to the Third Circuit Court of Appeals. The Third Circuit affirmed the dismissal of Brown's appeal, holding in part that Brown was not permitted to

represent the interests of the Kepoint Preservation Trust *pro se*. *Id.* at 3-4.

For the reasons expressed above, Brown is not a licensed attorney and is not permitted to represent a party other than himself, including the Kepoint Preservation Trust. Accordingly, Brown's Petition for a Writ of Certiorari must be dismissed.

III. Brown's Petition For A Writ Of Certiorari Should Be Denied Because He Has Failed To Demonstrate That The Pennsylvania General County Assessment Law, 72 P.S. §5020-101, *et seq.*, Violates Any Rights Under The Constitution.

A. The Respondents' taxation of the Subject Property pursuant to the Pennsylvania General County Assessment Law was proper.

The Kepoint Preservation Trust was taxed as the record owner of the Subject Property, pursuant to the Pennsylvania General County Assessment Law, 72 P.S. §§5020-101, *et seq*. Section 201 of the GCAL provides, in relevant part, as follows:

> "***The following subjects and property shall***, as hereinafter provided, ***be valued and assessed, and subject to taxation*** for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> (a) ***All real estate, to wit: Houses***, house trailers and mobilehomes buildings permanently attached to land or connected with water, gas, electric or sewage facilities, ***buildings, lands,***

lots of ground... and all other real estate not exempt by law from taxation...."

72 P.S. §5020-201(a) (emphasis added). The Subject Property, which consists of a residential building and land, is clearly taxable real property under the above provisions of the GCAL. Furthermore, Pennsylvania law clearly holds that the payment of real estate taxes is the obligation of the land owner. *City of Erie v. R.D. McAllister & Son*, 416 Pa. 54, 204 A.2d 650, 659 (1964). Inasmuch as the Kepoint Preservation Trust is the record owner of the Subject Property, the Respondents appropriately assessed real property taxes upon the Kepoint Preservation Trust.[3]

B. Respondents' taxation of the Subject Property does not offend the Contracts Clause of Article I, Section 10 of the United States Constitution.

The focus of Brown's argument concerning the impropriety of taxation under the GCAL has changed at every level of this case. Brown initially argued that the property was exempt from taxation under the GCAL because the Kepoint Preservation Trust allegedly falls within the description of an "excluded transaction" under the Real Estate Transfer Tax Act. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 32a, ¶ 25, citing 72 P.S. §8102-C.3(2) ("The tax imposed by section 1102-C shall not be imposed upon... [a] document which the Commonwealth is prohibited from taxing under the Constitution or statutes of the United States.").) However, Brown's argument failed because the taxes

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[3] The GCAL provides thirteen different exemptions to taxation. 72 P.S. §5020-204(a). However, Brown has never contended and/or shown that the Subject Property falls under one of those exemptions to taxation under the GCAL.

levied upon the Subject Property were not imposed upon the transfer or conveyance of the property pursuant to the Pennsylvania Real Estate Transfer Tax Act, but rather, were imposed on the real estate itself pursuant to the Pennsylvania General County Assessment Law, 72 P.S. §5020.101, et seq. ("GCAL"). Furthermore, inasmuch as Brown was unable to cite any authority in support of his contention that the exclusions provided under the Real Estate Transfer Tax Act apply equally to taxes levied under the GCAL, or any other taxing statute, the Pennsylvania courts appropriately rejected Brown's argument.

Although he found no support for the application of the Real Estate Transfer Tax Act exclusions to this case, Brown continued to cite the language from that statute, asserting that the Kepoint Preservation Trust is a "document which the Commonwealth is prohibited from taxing under the Constitution and statutes of the United States." Brown's argument has since been recast into his present claim that the GCAL "impairs the obligation of contract embodied in a trust deed... in violation of the Contract Clause of Article I, § 10, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment." (*See* Brown's Petition for a Writ of Certiorari, at 22, citing U.S. Const. art. I, § 10 ("No state shall... pass any... Law impairing the Obligation of Contracts.").) This argument is also without merit.

1. The states have broad powers to collect taxes on property falling within their jurisdiction.

Brown has failed to demonstrate, at any point in these proceedings, how or why the taxation of the Subject Property pursuant to the GCAL is

unconstitutional or invalid. It is well-settled that the states have broad powers to establish their own system of imposing and collecting taxes. *Allegheny Pittsburgh Coal Co. v. County Comm'n. of Webster County, W. Va.*, 488 U.S. 336, 344, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). "Power to tax for the support of the State governments exists in the States independently of the national government." *Transportation Co. v. Wheeling*, 99 U.S. 273, 279, 25 L.Ed. 412 (1878).

The right to tax is also established under Article VIII of the Pennsylvania Constitution. *Commonwealth of Pennsylvania v. Perkins*, 342 Pa. 529, 531, 21 A.2d 45, 47 (1941) ("The taxing power is vested absolutely in the legislature as an attribute of sovereignty with no other [limitation] upon its exercise than the Constitutions, State and Federal, and the laws of the United States, and the power to tax is bounded only by the necessity of the State and the will of the people."). Notably, although the Pennsylvania Constitution enumerates certain types of property that may be exempt from taxation, it does not provide an exemption for property held in trust. *See* Pa. Const. art. VIII, § 2. *See also* Pa. Const. art. VIII, § 5. Exercising its right to establish a system of taxation, the Pennsylvania legislature enacted the GCAL to permit local governmental entities, such as the Respondents, to assess and collect taxes on real property falling within their boundaries.

This Honorable Court has held that except as restrained by the Constitution of the United States or their own constitutions, each state, "has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government." *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 127, 30 S.Ct. 496, 54 L.Ed. 688 (1910). This Court has also held:

> "The Federal Constitution imposes on the states no particular modes of taxation, and apart from

> the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment."

Lawrence v. State Tax Comm'n. of State of Mississippi, 286 U.S. 276, 279-280, 52 S.Ct. 556, 76 L.Ed. 1102 (1932). In the absence of inequalities or arbitrary action, it is not the purpose of the Fourteenth Amendment "to interfere with the discretionary power of the states to raise necessary revenues by imposing taxes and assessments upon property within their jurisdictions." *Philip Wagner v. Oscar Leser, A. B.*, 239 U.S. 207, 216, 36 S.Ct. 66, 60 L.Ed. 230 (1915).

2. The Kepoint Preservation Trust is not a "contract" under the meaning of the Contracts Clause.

Brown does not allege that the taxation of the Subject Property was in any way arbitrary or discriminatory. Rather, Brown asserts that he may avoid lawful taxation by placing his property into a trust that he alone characterizes as a "contract," the obligations of which would be allegedly impaired if taxed. *See* U.S. Const. art. I, § 10 ("No state shall... pass any... Law impairing the Obligation of Contracts.").

As an initial matter, the Kepoint Preservation Trust does not fall within the definition of a "contract"

for purposes of protection under Article I, Section 10 of the Constitution. It is well-settled that the word "contracts," as used in the Contracts Clause, "is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent [express or implied] to its terms is of its very essence.'" *Crane v. Hahlo*, 258 U.S. 142, 146, 42 S.Ct. 214, 66 L.Ed. 514 (1922); *Morley v. Lake Shore & M.S.R. Co.*, 146 U.S. 162, 170, 13 S.Ct. 54, 36 L.Ed. 925 (1892). Here, Brown has failed to demonstrate that the Kepoint Preservation Trust possesses the necessary incidents of a "contract" under the ordinary definition. To the contrary, there was no agreement of two or more individuals to do or not do certain acts, nor was there any exchange of consideration.

In support of his argument that the Kepoint Preservation Trust is a "contract" that may not be impaired through taxation, Brown principally relies upon this Court's statement in *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1930), that "[t]he trust deeds are contracts within the meaning of the contract clause of the Federal Constitution." 282 U.S. at 595. However, a closer examination of *Coolidge* reveals that the present case is factually distinguishable, and that Brown has taken one isolated statement from *Coolidge* out of context.

First, the main issue presented in *Coolidge* was whether the trust deeds in that case could be subjected to taxation where they "were fully executed *before* the taking effect of the state law under which the excise is claimed." 282 U.S. at 595 (emphasis added). In that regard, the Court's holding, that states cannot impair through taxation rights that are already vested pursuant to a contract, is plainly distinguishable. Here, the GCAL was enacted by the Pennsylvania legislature in 1933, fifty years before Brown acquired the Subject

Property and more than sixty years before he conveyed the property into the Kepoint Preservation Trust through various "straw party mediators." (Record 18a-21a.) Therefore, unlike in *Coolidge*, it is clear that the Respondents did nothing to impair or destroy the rights that were already allegedly vested under the Kepoint Preservation Trust documents.

Second, it is clear that the facts in *Coolidge* are distinct from those in the present case regarding the existence of a "contract" for purposes of the Contracts Clause. *Coolidge* involved the formation of a mutually irrevocable trust by *two individuals*, who agreed to divest themselves of the right of possession or enjoyment of their property, in consideration for the other spouse's mutual promise. Here, by contrast, Brown has not demonstrated that *one person's* act of placing real property into a trust constitutes the formation of such a contract. Furthermore, it is clear from the facts of this case that Brown continues to possess and enjoy the Subject Property, as he is the "Trustee for Life" of the Kepoint Preservation Trust and presently resides and collects rent on the property.

Brown's reliance upon *Coolidge* also demonstrates that the Petitioner continues to misapprehend the nature of the tax imposed by the Respondents. In *Coolidge*, the relevant statute imposed taxes on the "deed, grant or gift" of property. 282 U.S. at 595. Here, by contrast, the relevant taxes were not imposed upon the transfer of the Subject Property or upon the formation of a contract. Nor was the tax levied upon Brown's act of placing the property into the "trust" or upon Brown's performance of his duties as a trustee of the Kepoint Preservation Trust. Although Brown appears to believe otherwise, the Respondents were simply taxing real property, and were not taxing a contract or other document. Consequently, the various Constitutional standards and Supreme Court

authorities cited by Brown in support of his nonspecific argument that individuals generally possess the "freedom to contract" and have the "right to private property," yield to more fully developed and applicable legal principles.

3. Respondents did not impair any "obligation of contract" as defined under the Contracts Clause.

Brown's remaining analysis of the Contracts Clause, and his reasoning that the Respondents have impaired the "obligation of contract," are also fatally flawed. "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced- - by which the parties can be obliged to perform it." *Hendrickson v. Apperson*, 245 U.S. 105, 113, 38 S.Ct. 44, 62 L.Ed. 178 (1917). Legislation therefore impairs the obligation of contract if it lessens the efficacy of the means to enforce the obligation or if it tends to postpone or retard the enforcement of the contract. *Id.* Here, Brown has not pointed to any impaired obligation under the alleged "contract," nor can he show that the GCAL lessens the capacity or power of the contracting parties to enforce the terms of that contract.

Although Brown routinely cites isolated statements from centuries-old cases addressing alleged violations of the Contracts Clause, this Honorable Court provided a more modern analysis of the Contracts Clause in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In *Keystone*, various coal companies challenged Section 6 of the Pennsylvania Subsidence Act, which permitted the Commonwealth to revoke a mining permit if the operator of a mine failed to repair

surface damage resulting from subsidence, or satisfy a claim arising therefrom, within six months of same. 480 U.S. at 477. The coal companies asserted that the Act violated the Contracts Clause of Article I, Section 10 of the Constitution, inasmuch as the Act would not allow the companies to hold surface owners of property to their previously-executed contractual waivers of liability for damage that may result to the surface property. 480 U.S. at 502.

The Court in *Keystone* began its analysis by noting that unlike other provisions in Article I, Section 10 of the Constitution, "the prohibition against impairing the obligation of contracts is not to be read literally." 480 U.S. at 502 (citations omitted). The Contracts Clause:

> "was made part of the Constitution to remedy a particular social evil--the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts--and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.'"

Id., quoting *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

The Court in *Keystone* explained that the Contracts Clause now has limited application to the powers of the states:

> "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into

> between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908): 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'"

480 U.S. at 503-04 (other citations omitted).

Applying the above principles to the Pennsylvania Subsidence Act, the Court in *Keystone* held that the Act completely removed the surface owners' contractual obligations to waive damages resulting from subsidence. 480 U.S. at 504. As such, the Subsidence Act operated as a "substantial impairment of a contractual relationship." *Id.* [4]

Unlike in *Keystone*, Brown has never stated precisely what "obligations" under the alleged trust "contract" would be impaired as a result of taxation pursuant to the GCAL. Even assuming, *arguendo*, that a contractual obligation existed in this case, it is clear that the GCAL does not impair the power of the parties to that "contract" to enforce its terms. Regardless, it is clear from the record of this case that the Commonwealth of Pennsylvania did not pass the GCAL

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[4] The Court in *Keystone* subsequently held that the Pennsylvania Subsidence Act survived Constitutional scrutiny, inasmuch as the Commonwealth had a "strong public interest" in preventing the type of environmental harm that prompted the enactment of the statute. 480 U.S. at 504-06.

in order to "impair" any of the rights or obligations of the Kepoint Preservation Trust under any contract. To the contrary, it was Brown who attempted to circumvent the ability of the Respondents to tax the real property that is the subject of this case.

In sum, with regard to the question of whether the Pennsylvania General County Assessment Law impairs the obligation of contract in violation of Article I, Section 10 of the Constitution, the Petitioner has failed to demonstrate that the Supreme Court of Pennsylvania decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; that it decided an important question of federal law that has not been, but should be, settled by this Court; or that it decided an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, the decisions entered by the Pennsylvania courts are entirely consistent with the decisions of this Court. Accordingly, the Respondent, Perkiomen Valley School District, respectfully submits that Brown's Petition for a Writ of Certiorari should be denied.

IV. Brown's Petition For A Writ Of Certiorari Should Be Denied Because This Honorable Court Has Already Determined That Where A State Taxing Statute Provides A Clear And Certain Remedy, A Taxpayer Cannot Avoid Those Statutorily-Prescribed Administrative Procedures By Bringing An Action Pursuant To 42 U.S.C. §1983.

As discussed above, the Respondents appropriately taxed the Subject Property pursuant to the Pennsylvania General County Assessment Law. It is therefore respectfully submitted that there is no basis

for a claim pursuant to 42 U.S.C. §1983. However, even assuming that Brown believed that the Subject Property was exempt from taxation, the plain terms of the GCAL required him to first "apply for redress" and exhaust specific statutory procedures before challenging the assessment of real estate taxes in the courts of Pennsylvania. Specifically, Section 511 of the General County Assessment Law provides for such claims to be heard before a three-member board of assessment appeals. *See* 72 P.S. §5020-511. Under Pennsylvania law, this statutory remedy is the mandatory and *exclusive* remedy of persons claiming that their real estate is exempt from local taxes. *See Aquarian Church of Universal Service v. County of York*, 90 Pa.Commw. 290, 494 A.2d 891 (1985); *Appeal of Susquehanna Collieries Co.*, 335 Pa. 337, 6 A.2d 831 (1939) (A taxpayer aggrieved by an assessment must follow the procedure set forth in the GCAL; he cannot appeal an assessment directly to the court of common pleas without first submitting it to the Board of Revision.) Brown does not dispute that he never pursued such a remedy.

A. The Pennsylvania courts correctly relied upon this Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission.*

Brown asserts that his action was inappropriately dismissed because administrative remedies supplied by the states are not a necessary prerequisite to bringing a claim pursuant to 42 U.S.C. §1983. However, this Court came to the opposite conclusion with respect to matters of state taxation in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995). In *National Private Truck Council*, the

plaintiffs brought a Section 1983 claim challenging the constitutionality of "third-structure taxes" imposed by the state of Oklahoma.[5] On appeal, the Oklahoma Supreme Court held that the plaintiffs were not entitled to relief under Section 1983 because adequate remedies for challenging the tax existed under state law. The United States Supreme Court granted certiorari "to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide relief under [Section] 1983 when adequate remedies exist under state law." 515 U.S. at 585.

The Court in *National Private Truck Council* initially observed, as it stated more than a century earlier in *Dows v. Chicago*, 78 U.S. 108, 11 Wall. 109, 20 L.Ed. 65 (1871), that the principles of federalism and comity generally hold that federal courts "should adopt a hands-off approach with respect to state tax administration." 515 U.S. at 586. The Court further expounded upon the reasons for the continuation of this practice:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

515 U.S. at 586, quoting *Dows*, 11 Wall. at 110.

The Court in *National Private Truck Council* further observed that Section 1983 has not been interpreted to interfere with the power of the states to tax: "[s]ince the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal

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[5] As explained by the Court, "third-structure taxes" are "nonregistration, nonfuel taxes that are neither apportioned nor prorated. One example of a third-structure tax is an axle tax, which imposes a flat charge based on the number of axles per vehicle." 515 U.S. at 584 n. 1.

interference with tax administration." *Id.* Thus, the Court noted that "[a]s long as state law provides 'a clear and certain remedy,' the states may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)." 515 U.S. at 587 (citations omitted). The Court in *National Private Truck Council* therefore opined that because the plaintiffs did not dispute the adequacy of Oklahoma's legal remedies for the redress of tax disputes, Section 1983 "did not authorize the disruption of state tax administration." 515 U.S. at 590. Accordingly, the Court held that the plaintiffs were required to exhaust the state administrative remedies instead of filing a civil action under Section 1983. 515 U.S. at 592.

Brown attempts to argue that *National Private Truck Council* is inapplicable because the administrative remedies established under the GCAL for the redress of tax grievances are inadequate. In his Petition for a Writ of Certiorari, Brown asserts that his action "raises no question of an overassessment or an improper exemption in connection with the tax," but rather, raises a question concerning the validity or constitutionality of the GCAL, which question the Montgomery County Board of Assessment Appeals is allegedly incompetent to address. (*See* Brown's Petition for a Writ of Certiorari, at 20-21.) However, even in his Petition for a Writ of Certiorari, filed more than two years after he instituted suit, Brown cites no authority stating that entities such as the Board of Assessment Appeals are generally incapable of measuring the validity or applicability of the very statutes under which they operate. Furthermore, Brown fails to state precisely what issues relevant to this case the Board of Assessment Appeals would be incapable of determining, and he has never provided any evidence as to how or why the Board of Assessment Appeals would be incompetent to address those issues. Finally, and

perhaps most importantly, Brown does not state how or why the Board of Assessment Appeals would be incapable of granting him the relief he requests in this case, which presumably is to allow the Subject Property to go untaxed. Accordingly, Brown fails to demonstrate that the trial court incorrectly relied upon *National Private Truck Council* in denying his Petition for Preliminary Injunctive Relief and dismissing his Complaint. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 10a and 17a.)

B. Other Supreme Court and state cases cited by Brown with regard to the exhaustion of administrative remedies in Section 1983 actions are inapplicable to the present case, in which the challenged action relates to state taxation.

Brown attempts to argue that the decisions of the Pennsylvania courts were in conflict with decisions of this Court and/or the decisions of other state courts of last resort concerning an important federal question. Although Brown cites a long list of cases that he claims support his position that administrative remedies need not be exhausted before bringing a claim pursuant to Section 1983, a review of those cases reveals that they are all inapplicable to the present matter.

First, Brown argues against the application of *National Private Truck Council* by claiming that it conflicts with previous decisions of this Court. Notably, however, none of the Section 1983 cases cited by Brown pertain to matters of state taxation, which is the issue presented in this case. *See Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (plaintiff challenged Florida's statutes governing admission of mental patients into state hospital); *Monell v.*

Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (Section 1983 claim relating to police department's discriminatory policy relating to pregnant employees); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 473 (1961) (Section 1983 claim relating to illegal search and seizure by city police officers); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (plaintiff challenged employer's allegedly discriminatory employment practices); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (same).

As this Court explained in *National Private Truck Council*, claims involving matters of state taxation are a different creature than other types of Section 1983 claims, such as the ones presented in the cases cited by Brown. This is because federal courts adopt a "hands-off approach" with respect to state tax administration for purposes of Section 1983. *National Private Truck Council*, 515 U.S. at 586. Inasmuch as the present case involves matters of state tax administration, the Pennsylvania courts appropriately applied *National Private Truck Council*.

Similarly, although Brown cites eleven cases from different state courts in support of his argument that exhaustion of state remedies is not required in civil rights actions, the overwhelming majority of those cases also relate to matters other than state taxation. *See Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991) (plaintiff asserted Section 1983 claim based on allegedly unlawful employment action); *Eberhardt v. Levasseur*, 630 So.2d 844 (La. 1994) (same); *Prager v. State of Kansas, Department of Revenue*, 271 Kan. 1, 20 P.3d 39 (2001) (same); *Maryland-National Capital Park and Planning Comm'n. v. Crawford*, 307 Md. 1, 511 A.2d 1079 (1986) (same); *Leach v. New Mexico Junior College*, 132 N.M. 106, 45 P.3d 46 (2002) (same);

Montoya v. City of Colorado Springs, 770 P.2d 1358 (Colo.App. 1989) (same); *King ex rel. Jacob v. Secretary, Indiana Family and Social Services Org.*, 774 N.E.2d 1008 (Ind.Ct.App. 2002) (plaintiff brought claims under Section 1983 and Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as a result of defendants' failure to increase the amount of her home health care); *Petersen v. Davenport Community School District*, 626 N.W.2d 99 (Iowa 2001) (plaintiff class contended that school district violated their due process rights by invalidating signatures on petitions seeking election to block instructional support program approved by board); *New York City Coalition to End Lead Poisoning v. Giuliani*, 187 Misc.2d 425, 720 N.Y.S.2d 298 (2000) (plaintiffs alleged violation of Section 1983 and Medicaid Act, 42 U.S.C. §1396, as a result of defendants' alleged failure to provide adequate lead-poisoning screening, diagnosis and treatment program); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo.App. 1991) (plaintiff brought Section 1983 claim based on alleged assault and battery by city police officers). Notably, the Court in *Prager* observed that the outcome of that case might have been different if the state taxation exception to the "no-exhaustion rule for § 1983 actions" were applicable. 20 P.3d at 52.

Brown cites only one state case involving a Section 1983 claim that arguably falls under the category of state taxation. *See Peoples Rights Organization v. Montgomery*, 142 Ohio App.3d 443, 756 N.E.2d 127 (2001). Notably, however, *Montgomery* was decided by an intermediate-level court from Ohio. Therefore, that decision alone does not warrant the exercise of this Court's jurisdiction, which is reserved only for conflicts among decisions by the state courts "of last resort." *See* U.S. Sup. Ct. R. 10(a).

Regardless, *Montgomery* is distinguishable from the present action and is not in conflict with any of the

decisions entered by the Pennsylvania courts in this case. The court in *Montgomery*, following the Ohio Supreme Court's earlier decision in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992), held that an Ohio statute, which would otherwise require claims against the state to be submitted to a Court of Claims, "is not applicable to Section 1983 claims because such suits are founded in federal, not state, law." 756 N.E.2d at 155. However, a closer examination of the Ohio Court of Claims statute reveals that the statute expressly limits its application to "any civil action that arises under *the law of this state*." *Conley*, 595 N.E.2d at 869, citing R.C. 9.86 (emphasis in original). Hence, the courts in *Conley* and *Montgomery* determined that the administrative remedies provided under the Ohio Court of Claims statute were specifically limited to claims arising under Ohio law, and had no application to claims arising under Federal law. *Id.*

Unlike in *Conley* and *Montgomery*, the GCAL contains no specific provision limiting the application of its remedies to claims arising under state law. Accordingly, *Montgomery* cannot be read to hold, as Brown suggests, that there is a conflict among the states as to whether a civil rights plaintiff must first exhaust state administrative remedies, even in matters of state taxation or assessments.

For all of the foregoing reasons, it is clear that the Pennsylvania courts appropriately relied upon this Honorable Court's decision in *National Private Truck Council* in dismissing or affirming the dismissal of Brown's action. Accordingly, Brown has failed to establish that that the Supreme Court of Pennsylvania has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" that it has "decided an important question of federal law that has not been, but should be, settled by this Court;" or

that it has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10.

CONCLUSION

For all of the foregoing reasons, Respondent, Perkiomen Valley School District, respectfully requests that the Petition for a Writ of Certiorari filed by Petitioner, S. James Brown, Joint Tenant Trustee, be denied.

Respectfully submitted,

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Date: May 26, 2005

APPENDIX

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-3708

KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

Kepoint Preservation Trust Org.,
Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 00-cv-04564)
District Judge: Mary A. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
June 26, 2002

Before: SLOVITER, AMBRO AND ROSENN,

CIRCUIT JUDGES
(Filed Jul. 03 2002)

OPINION

PER CURIAM

In September 2000 a civil rights complaint signed by "J. Brown, Joint Tenant Trustee for Plaintiff" was filed in the United States District Court for the Eastern District of Pennsylvania on behalf of "Kepoint Preservation Trust Org. . . . an independent, unincorporated, private inter vivos trust organization" and "Plaintiff, J. Brown, Joint Tenant trustee." The complaint, which arose from the imposition of state transfer taxes following the transfer of real estate from an individual to the trust,[1] alleges that taxation of the trust violates both the Contracts Clause, U.S. Const. Art. I, § 10, cl. 1, and Pennsylvania law. The complaint seeks actual punitive damages, along with injunctive and declaratory relief.

I

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[1] In May 1997 the Bureau of Individual Taxes of the Pennsylvania Department of Revenue made a determination of transfer tax due. In August 1997 Kepoint petitioned the Board of Appeals for redetermination. After the Board sustained the transfer tax deficiency, Kepoint filed an appeal with the Board of Finance and Revenue, which denied the appeal. Instead of appealing to the Commonwealth Court of Pennsylvania pursuant to 42 Pa. Cons. Stat. § 763, Kepoint filed an action in the Montgomery County Court of Common Pleas, which dismissed the action because the Commonwealth Court had exclusive jurisdiction.

The district court granted the defendants' motion to dismiss. The court concluded that the state and its agencies are protected from the action by the Eleventh Amendment because Pennsylvania has not waived its immunity, while the action against defendant Fisher in his individual capacity is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which expressly bars federal courts from granting injunctive relief in cases involving tax schemes where a "plain, speedy, and efficient" remedy exists under state law. The court found that the system of review provided by 42 Pa. Cons. Stat. §§ 1104, 763 and 723 is such an avenue because it provides the taxpayer with a full hearing and judicial determination at which he could raise any and constitutional objections to the tax as required by *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The court concluded that the claims fro declaratory and monetary relief were also barred by the Tax Injunction Act and declined to assert jurisdiction over the sate law claim. The plaintiffs filed a motion for reconsideration, which was denied along with their outstanding motions. This timely appeal followed.

II

As an initial matter, we note that J. Brown is not an attorney who is a member of this Court's bar and thus may not represent a party other than himself. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). Mr. Brown filed an amended notice of appeal stating that he was appealing the district court's judgment, but because it was unclear whether he also sought to represent Kepoint, the Clerk sent him a letter advising that, pursuant to *Rowland*, he may not represent Kepoint and that he should obtain counsel to represent Kepoint on pain of dismissal. Mr. Brown responded to the Clerk, but has not obtained counsel to

represent Kepoint. It is unclear from his response whether he is arguing that he should be allowed to represent the trust or is proceeding on his own behalf exclusively. To the extent that Kepoint is a party to the appeal, the appeal is dismissed as to it.

To the extent that Mr. Brown himself was a party to the action below and is an appellant here in his own right, we shall affirm the judgment of the district court for essentially the same reasons given by the district court in granting the defendants' motion. The Tax Injunction Act bars both injunctive and declaratory relief, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982), while "the free-standing principle of comity" bars damages. *Wright v. Pappas*, 256 F.3d 635, 637 (7th Circ. 2001). Mr. Brown's motion to file a supplemental reply brief is denied as moot.

(2)

No. : 04-1432

Supreme Court, U.S.
FILED
JUN 14 2005
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In the

Supreme Court of the United States

S. James Brown, Joint Tenant Trustee,

Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision of the Commonwealth Court of Pennsylvania should not be allowed to stand, because it incorrectly suggests that citizens cannot bring, under any circumstances, a § 1983 action to challenge unconstitutional state taxation in state courts. Assuming *arguendo* that this Honorable Court's decision in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981) closes the Federal courthouse doors to civil litigants pursuing § 1983 actions involving state taxation because of the Tax Injunction Act, it is fundamental that an "exhaustion" requirement superimposed on state tax § 1983 litigation does not comport with all due process components of the Fourteenth Amendment. *See e.g. Board of County Commissioners*, 253 U.S. 17 (1920)(taxpayer must have opportunity to challenge unconstitutional state taxation). It is worth of noting that not every trust instrument creates a corporation, or taxable association, or "taxpayer". The Respondents have arbitrarily misclassified this trust arrangement as a corporation for taxation purposes.

REASONS FOR GRANTING THE WRIT

I. Kepoint Preservation Trust is Not Named as a Party to This Action And Petitioner Brown Is A U.S. Citizen Holding The Right To "Make and Enforce Contracts" And Sue In Every State And Territory, And, As Such, May Plead His Own Case Personally.

Section II of the Respondent's Brief in Opposition states that "Brown's Petition For A Writ of Certiorari Should Be Denied Because He Cannot Represent Kepoint Preservation Trust *Pro Se* In This Action although it did not form the basis of any of the Pennsylvania Court's decisions..." Their assertion appears to serve only to attempt to distract the attention of this Court away from the questions presented because the lower courts were well aware, that Kepoint Preservation Trust (Hereinafter "Kepoint") is not, and was never named as a party in the state court proceedings below. Petitioner Brown commenced a §1983 action in his own right as a real party in interest held subject to a private declaration of trust contract embodied in a trust deed. The fact that Brown is a

trustee and real party in interest to the trust arrangement is not in dispute. He is defending his personal legal rights and fiduciary interests which are protected by federal law from impairment under color of State law and enforcing the terms of the executory trust agreement to convey against unlawful state action.

In support of his contention that trustees are real parties in interest and persons with the right to commence a § 1983 action, the Petitioner again directs the Court's attention to its holding in *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 462 (1980). The *Navarro* Court stated clearly that:

> As early as 1808, the Supreme Court of the United States stated that "trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. *Chappedelaine v. Dechenaux*, 4 Cranch 306, 308. Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties in interest for procedural purposes.

Id. at 462. In *Thomas v. N.A. Chase Manhatten Bank*, 994 F. 2d 236 (5th Cir. 1993), the Court of Appeals for the Fifth Circuit held that state law governed a trustee's capacity to sue. Applying Missouri law, the Fifth Circuit held that the trustee of an express trust has the power "[t]o prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties." *Thomas*, 994 F.2d at 243 (citations omitted).

Similarly, Pennsylvania law, namely 20 Pa. C.S. § 7131. Possession of real and personal property states the following:

> Except as otherwise provided in the trust instrument, the trustee, until it is distributed or sold, shall have the right to and shall take possession of, maintain and administer each real and personal asset of the trust, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to real or personal property of the trust.

20 Pa. C. S. § 7131. In addition, 28 U.S.C. § 1654 provides that "[I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." Thus far, Petitioner Brown has chosen to proceed personally as a matter of right in accordance with 28 U.S.C. § 1654.

The Respondents rely on *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993) to contend that Petitioner Brown may not represent the interests of the Kepoint Preservation Trust *pro se*. First, the *Rowland* Court observed that, with respect to federal courts, corporations as well as the unincorporated group of prisoners involved in the case could appear only through licensed counsel. The *Rowland* decision is not presidential in a state court action, especially one involving a trustee. Counsel for the Respondents acknowledged "that it has been unable to find any Supreme Court cases in which the above rule was specifically applied to matters involving a trustee." **Pa. R. Civ. P**. 2002 allows a trustee or other real party in interest to commence a § 1983 action in Pennsylvania courts. Under 28 U.S.C. § 1654, a party may plead and conduct their own cases personally in all courts of the United States.

Petitioner Brown does not have the burden of demonstrating that Pennsylvania's General County Assessment Law, namely 72 P.S. § 5020-101 et seq., (Hereinafter GCAL), violates rights under the constitution prior to a court of proper jurisdiction taking jurisdiction over his § 1983 claim. Two, and only two, allegations are required in order to state a § 1983 cause of action: (1) plaintiff must allege that some person has deprived him of federal right, and (2) plaintiff must allege that the person who has deprived him of that right acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635 (1980). The purpose for seeking a judicial determination is to receive a ruling on the merits of the justicable controversy between the parties. The federal court doors were closed to Petitioner Brown's § 1983 action for a lack of subject matter jurisdiction. Similarly, the state court doors were closed when his state court action was dismissed for lack of subject matter jurisdiction. This result should be found by this Honorable Court to be unacceptable, especially where substantive due

process rights as well as underlying contract rights may be lost forever absent the granting of certiorari.

It is abundantly clear that Petitioner Brown has standing to proceed personally. This Honorable Court should not be distracted by the formula of smoke and mirrors conjured up by the Respondents in their Brief in Opposition but should grant careful consideration to Petitioner Brown's Petition for a Writ of Certiorari.

II. Whether The Respondents' Actions Utilizing State Taxing Powers Violate Petitioner Brown's Federal Rights, Privileges, Or Immunities Arising As A Result Of Contractual Relations Under The U.S. Constitution Is A Federal Question Which Can Only Be Properly Adjudicated Under 42 U.S.C. § 1983.

Pennsylvania's GCAL imposes tax on "all real estate to wit".[1] Notably absent from the Respondent's Brief in Opposition at section III-A, pp. 10-11, is their explanation of how the GCAL properly excludes realty from tax, which is held in the stage of its ownership not to be taxable. This Honorable Court stated clearly in *Murray v. City of Charleston*, 96 U.S. 432 (1877):

> We have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable...

Id. at 446. Simply put, the GCAL does not appear to provide an exclusionary clause to provide for fact that constitutional limitations prohibit the Commonwealth from taxing realty held in the one stage of ownership that this Court has held "not to be taxable."

The Respondents', in their Brief at pp. 14-17 contend that "[T]he Kepoint Preservation Trust is not a "contract" under the meaning of the Contracts Clause." However, this Court addressed this precise question in the famous and important case of *Trustees*

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[1] See Respondent's Brief at page 10, Section III-A at (a) and Petitioner's Brief at page 3 with respect to Pennsylvania's GCAL.

of Dartmouth College v. Woodward, 17 U.S. 518, 656-57 (1819) by stating:

> What is a contract? It may be defined to be a transaction between two or more persons, in which each person comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, &c., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved; these must all occur, because the regular effects of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of *Fletcher v. Peck*, 6 Cranch 87, in which it was laid down, that a contract is either executory or executed; the object of the contract is performed, and this differs in nothing from a grant; but whether or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

Id. Trustees of Dartmouth College, 17 U.S. at 656-57. Here, if rights granted by the deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law and impairs the obligation of the contract. The converse is equally true. Unless the tax can be sustained as an excise, it must fail altogether; if the statute were construed as imposing a property tax, it would be repugnant to the Constitution of Pennsylvania. It appears to require arbitrary or

discriminatory state action to impose tax on property disposed of and held in the stage of ownership this Court held not to be taxable within the jurisdiction of the United States simply by misclassifying the trust contract as a corporation, and "taxpayer" for taxation purposes.

Here, the subject property is held under terms of a declaration of trust embodied in a trust deed. It can require no argument that the trust instrument in the instant case constitutes a contract within the meaning of the federal Constitution. This principle is well established by this Court's holding in *Coolidge v. Long*, 282 U.S. 582, 595 (1930), that "[t]he trust deeds are contracts within the meaning of the contract clause of the Federal Constitution." The particular facts or the type of tax at issue is not relevant to the fact that a trust deed is a contract protected by the provisions of the federal Constitution. The *Coolidge* Court re-stated the rule that when the jurisdiction of this court is invoked to determine whether ...the state is depriving him of his property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect." *Id.* at 597.

The Respondents' attempt to use this Court's ruling in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) to suggest that the Contract Clause been superceded by the police powers of the states. However, this Court stated as recently as 1978 in *Allied Structural Steel v. Spannaus*, 438 U.S. 234, (1978), that,

> [t]he Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause in modern constitutional history. Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter. *Id.* at 241. The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their

> personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. In 1872, the United States Supreme Court in *Walker v. Whitehead*, 83 U.S. 314 (1872) stated the timeless principle that:

> Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts of the obligation which guaranteed by the Constitution against impairment...The States may change the remedy, provided that no substantial right secured by the contract is impaired. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives it protection to that extent.

83 U.S. at 317-318. An action at law or in equity provided by 42 U.S.C. 1983 is the only clear and complete remedy to enforce contractual rights, which are protected by the Fourteenth Amendment from impairment under color of state law.[2]

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[2] T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high application, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

III. Section 1983 Actions in State Court Are Necessary To Provide A Complete And Certain Remedy For Unconstitutional State Taxation.

Respondent Perkiomen Valley School District complains that the § 1983 cases cited by Petitioner Brown were not all state taxation cases at pp. 25-27 of its Brief.[3] However, there is a split of authority among the highest courts in several states even in this subset of civil rights litigation involving state taxation. See *Beverly Bank v. Board of Review*, 117 Ill. App.3d 656, 664-65, 453 N.E.2d 96, 102 (1983)(state court entertained state tax § 1983 claim), *cert. denied*, 104 S.Ct. 2153 (1984); *Dutoit v. Board of County Commissioners*, 233 Kan. 995, 1004-06, 667 P.2d 879, 888-90 (1983). *But see Beckus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976)(taxpayer may not circumvent state procedures by asserting § 1983 claim); *State Tax Commission v. Fondren*, 387 So.2d 712, 723 (Miss. 1980)(*en banc*), *cert. denied*, 450 U.S. 1040 (1981); *Stufflebaum v. Penthiere*, 691 S.W.2d 271, 272 (Mo. 1985)(*en banc*); *Spencer v. South Carolina Tax Commissioner*, 281 S.C. 492, 497, 316 S.E. 386, 388-389 (1984), *aff'd by an equally divided court*, 105 S.Ct. 1859 (1985)(*per curium*).

The Respondents' misinterpret the decision in *National Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995) as applied to the remedy provided under Pennsylvania's GCAL. Pursuant to this Court's ruling in *National Truck*, the state law must provide "a clear and certain remedy." If the state law does not provide "a clear and certain remedy", a § 1983 action may proceed without regard to the initiation or exhaustion of the inadequate state administrative remedies provided. As the Respondents' correctly point out, the Court in *National Truck* opined that because the plaintiffs did not dispute the adequacy of Oklahoma's legal remedies for the redress of tax disputes, Section 1983 "did not authorize the disruption of state tax administration."

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[3] Petitioner Brown cited certain cases including, for example, *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) because this Court appeared to distinguish a difference between the right of a plaintiff to proceed with substantive vs. procedural § 1983 claims.

Id. at 592. Here, the adequacy of Pennsylvania's legal remedies are, and were in dispute since the inception of the case[4] where the trust arrangement did not create a natural person, corporation, taxable association, or "taxpayer" as statutorily defined for taxation purposes. Therefore, Petitioner's 1983 action is proper before the Pennsylvania courts and this Court's precedent in *National Truck* should be interpreted to provide that civil rights actions alleging impairment under color of State law of the right to "make and enforce contracts" must be able to proceed in state courts where an adequate remedy does not exist under state law.

A § 1983 cause of action involving state taxation will not jeopardize the integrity of states' tax systems. In the first place, only a citizen deprived of a federal constitutional right will be able to assert a successful § 1983 action; most tax challengers lack this crucial element. Second, because the state tax § 1983 action lies in state court, rather than federal court where no exhaustion is required, state courts may be able to require a "taxpayer" to exhaust state administrative remedies before asserting his § 1983 action, if the administrative remedy is adequate pursuant to federal requisites. Finally, even if he is litigating substantial federal claim, as state tax § 1983 claimant will not be exempted from paying the tax he owes. Section 1983 neither alters the requirements necessary to obtain equitable relief nor prevents a state from enforcing its laws. Therefore, a taxpayer cannot, by asserting a § 1983 cause of action, prevent a state from taking its usual steps to collect any lawful taxes it has levied. *Note Section 1983 In State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 430-31.

The issues raised in the petition are important to the rule of law for the nation at large as well as to the parties. The Respondent fails to recognize that the general considerations

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[4] *See* Petitioner's Brief, Appendix at 31(a), paragraph #20 alleging that: Plaintiff has an inadequate remedy at law that fails to (1) avoid multiplicity of suits (annual) (2) prevent irreparable injury to the Plaintiff involving his right and fiduciary duty to fulfill his lawful calling and contractual obligation absent arbitrary and unlawful impairment by Defendants (3) provide necessary equitable relief available in the form of a declaratory judgement and injunctive relief.

outlined in **U.S. Sup. Ct. R.** 10 are neither controlling nor fully measure the Court's Discretion. For example, this Court may exercise certiorari jurisdiction where the state court has held... or has sustained...the validity of a state statute as against a claim of repugnance to the federal Constitution", or to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation, or despite the absence of a conflict, state court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is sufficiently important, or where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution. *See Supreme Court Practice, Seventh Addition*, 1993, pp. 208-210.

Petitioner Brown respectfully suggests that he has raised substantial federal questions involving his Due Process rights and established not one, but several important considerations relative to the appropriateness of exercising certiorari jurisdiction. The various federal questions involved in the case *sub judice* are questions that require a judicial determination.

CONCLUSION

The Court should grant this petition and directly address the application of the Exhaustion Doctrine to § 1983 actions commenced in state courts with respect to vested rights protected by Fourteenth Amendment and the Contract Clause of Article I, § 10 of the Federal Constitution.

Respectfully submitted this 14th Day of June, 2005,

By: S. James Brown

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